Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1997

JEFFREY MAUSOLF, ET AL.,
Plaintiffs-Appellees,

vs.

BRUCE BABBITT, ET AL.,
Defendants,

VOYAGEURS REGION NATIONAL PARK ASSOCIATION, ET AL.,
Intervenors-Appellants.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Corey J. Ayling
Counsel of Record
Kathleen M. Brennan
McGRANN SHEA FRANZEN CARNIVAL
STRAUGHN & LAMB, CHARTERED
2200 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2041
(612) 338-2525

Attorneys for Petitioners

1998 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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QUESTIONS PRESENTED

1. DOES THE JUDICIARY EXCEED ITS POWER UNDER ARTICLE III WHEN IT GRANTS A PRIVATE PETITION TO UPHOLD REGULATIONS NOW ABANDONED BY THE EXECUTIVE BRANCH?

2. MUST WILDLIFE PROTECTION MEASURES UNDER THE 1916 NATIONAL PARK SERVICE ORGANIC ACT CONFORM TO THE STRICTURES OF THE 1973 ENDANGERED SPECIES ACT?

3. IS A PARK CLOSURE TO PROTECT THREATENED SPECIES THAT IS BASED PURELY ON ANECDOTAL EVIDENCE OF MERE INCONVENIENCE TO INDIVIDUAL ANIMALS, THAT INCLUDES NO FINDING OF HARM TO SPECIES POPULATIONS, THAT REVERSES LONGSTANDING ADMINISTRATIVE PRACTICE, THAT FAILS TO CONSIDER THE INTEREST IN RECREATIONAL USE OF AND ACCESS TO THE PARK, AND THAT IS OPPOSED BY THE GOVERNMENT'S OWN WILDLIFE PERSONNEL ARBITRARY AND CAPRICIOUS?

LIST OF PARTIES

Petitioners consist of individual snowmobile enthusiasts Jeffrey Mausolf, William Kullberg, and Arlys Strehlo, who reside in the State of Minnesota, and the Minnesota United Snowmobile Association, an organization promoting snowmobiling in which each of the individual plaintiffs is a member.

Petitioners commenced this action against defendants Bruce Babbitt, Secretary of the U.S. Department of the Interior; Roger Kennedy, Director of the National Park Service; Mollie Beattie Director of the U.S. Fish and Wildlife Service; and Ben Clary, Superintendent of the Voyageurs National Park. Petitioners were respondents in the two separate appeals taken to the United States Court of Appeals for the Eighth Circuit. The latter appeal forms the subject of this petition for certiorari.

The parties also include intervenors Voyageurs Region National Park Association; Sierra Club, North Star Chapter; The Humane Society of the United States; The Friends of the Boundary Waters Wilderness; the National Park and Conservation Association; Izaak Walton League of America; and the Wilderness Society. These parties were denied intervention by the District Court but were granted leave to brief and argue the case as amici curiae. The intervenors successfully appealed the denial of intervention and were granted the right of mandatory intervention. On remand, the intervenors prosecuted an appeal of the merits of the case after the government defendants elected to drop their own appeal of the merits and to accede to the district court's rulings on the merits.

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OPINION BELOW

Petitioners seek review of the opinion filed by the United States Court of Appeals for the Eighth Circuit on September 23, 1997 and entitled Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) (slip opinion no. 96-1856 reprinted in appendix hereto ("App.") at 1A). The Eighth Circuit denied rehearing and rehearing en banc on December 3, 1997. App. 77A.

The procedural history of the case includes a previous interlocutory appeal to the Eighth Circuit and a number of published and unpublished decisions, viz.:

- Magistrate's September 7, 1994 order denying intervention motion of Voyageurs Region National Park Association, et al., but allowing same to participate in briefing and argument as amici curiae; published as Mausolf v. Babbitt, 30 Fed. R. Serv. 3d 1285 (D. Minn. 1994) (Erickson, J.); the slip opinion is reprinted at App. 65A;

- District court's November 9, 1994 order affirming Magistrate's denial of intervention; the district court's unpublished slip opinion in the matter of Mausolf v. Babbitt, No. 5-94-CV-8 (D. Minn. Nov. 9, 1994) (Rosenbaum, J.) is reprinted at App. 63A;

- District court's January 23, 1996 order granting plaintiff-petitioners summary judgment and striking the park regulations at issue; published as Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996) (Rosenbaum, J.); the slip opinion is reprinted at App. 21A; and

- Eighth Circuit's June 3, 1996 interlocutory ruling reversing the district court's denial of the intervention

motion of the Voyageurs Region National Park Association, et al.; published as Mausolf v. Babbitt, 85 F.3d 1295 (8th Cir. 1996); the Eighth Circuit's slip opinion no. 95-1201 is reprinted at App. 43A).

JURISDICTION

The Court enjoys jurisdiction to review the opinion and mandate of the Eighth Circuit pursuant to 28 U.S.C. § 1254(1).

Petitioners' petition for rehearing by the panel (which was combined with a petition for rehearing en banc pursuant to U.S. Eighth Cir. Rules 35A(c)(4), 40A(2), and which was timely filed on November 7, 1998 within forty-five days of the panel opinion as ordered by the Eighth Circuit) stayed the ninety-day period in which to petition for certiorari. That ninety-day period runs from issuance of the December 3, 1997 order denying rehearing, not from the ensuing issuance of the mandate on December 13, 1997. U.S. Supreme Court Rule 13.3. This petition was therefore due March 3, 1998 and was timely filed by that date.

The federal government defendants Babbitt, et al. were parties to the appeal but voluntarily dismissed their appeal on April 24 1996, App. 19A, thereby acquiescing to the district court's ruling on the merits. The intervenors prosecuted the appeal of the merits in the absence of the government defendants. Service has been made on the government defendants by their counsel of record and service has further been made on the Solicitor General, to the extent required by U.S. Supreme Court Rule 29.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

U.S. Const. art. III § 1

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B)

> ...[W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to --
>
> ....
>
> (B) take any such species within the United States....

Endangered Species Act, 16 U.S.C. § 1532(19)

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

Endangered Species Act, 16 U.S.C. § 1536(a)(2)

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered or threatened species or result in the

destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Endangered Species Act, 16 U.S.C. § 1539(a)(1)(B)

The Secretary may permit, under such terms and conditions as he shall prescribe --

....

(B) any taking otherwise prohibited ... if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

National Park Service Organic Act of 1916, 16 U.S.C. § 1

There is created in the Department of Interior a service to be called the National Park Service .... The service thus established shall promote and regulate the use of the Federal areas known as national parks ... to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

STATEMENT OF THE CASE

Plaintiffs-appellees (the "Snowmobilers") are snowmobile enthusiasts who have snowmobiled within the Voyageurs National Park in northern Minnesota (the "Park") for recreation and for love of nature. They commenced the action below under the Endangered Species Act ("ESA") and the Administrative Procedures Act ("APA") to review rules (the "Lakeshore Closure") promulgated by the National Park Service ("NPS") prohibiting snowmobiling on frozen lake surfaces along the shoreline -- the most scenic and desirable areas for snowmobiling. The regulations were promulgated in the wake of a biological opinion issued pursuant to the ESA by the Defendant Fish and Wildlife Service ("FWS") calling for closure. FWS Biological Opinion of 2/28/92 at 7 ¶ 3, Administrative Record at tab 46 (Snowmobilers Appendix filed in Eighth Circuit File No. 96-1856 ("Sn. App.") at 112, 121).

The FWS opinion relied entirely on anecdotal evidence of takings, which itself was limited to one den abandonment, one aerial gunning, and rumors of one snowmobile disturbance of wolves feeding on a kill. Id. at 7 ¶ 4 (Sn. App. at 121). In the years leading to this Opinion, FWS apparently pressured its own wolf biologist, Dr. Mech, to revise his previous finding that "I know of no evidence, or reason to believe, that snowmobiling . . . will have a detrimental effect on the survival of your wolf population" (Letter from Mech to Berry of 4/29/87 at ¶ 2, Admin. Rec. at tab 7 (Sn. App. at 111)). Dr. Mech stood firm:

> We have studied wolves full-time for twenty years in areas that are heavily snowmobiled. Wolves accommodate and adjust to snowmobiling just as they do to traffic, canoeists, airplanes, open pit mines and other disturbances. While such intrusions may

> inconvenience wolves, we have no evidence or reason to believe that they affect wolf numbers, reproduction, or survival, except through the loss of habitat or direct and illegal taking of wolves.... I cannot revise my earlier statement.

Letter from Mech to Berry of 4/11/89 at ¶ 2, Admin. Rec. at tab 17 (Sn. App. at 167). Mech even expressed his dislike of snowmobiling, but acknowledged "that is my personal view and it is not based on any detrimental effect to wildlife . . . ." Id. at ¶ 3 (Sn. App. at 167).

The NPS reluctantly decided to implement the 1992 FWS biological opinion. Park Superintendent Clary noted that "the leading wildlife biologists, including USFWS biologists, have once again stated that snowmobiling will not have [a] significant impact on the gray wolf. For this reason, we should question the [biological] opinion." Mem. from VNP Superintendent Clary to NPS Regional Director of 5/15/92 at 4 ¶ 2, Admin. Rec. at tab 49 (Sn. App. at 168, 171). In a published interview, Clary acknowledged that there was only one documented case of a snowmobiler intentionally interfering with wolves in the Park's twenty-plus-year history; but, he had to follow FWS' contrary opinion because "They're our boss." International Falls Daily Journal, 12/3/92, Admin. Rec. at tab 52 (Sn. App. at 172).

On January 24, 1996, the district court issued an order granting the Snowmobilers summary judgment and permanently enjoining enforcement of the lakeshore closure. The district court reasoned that even a "generous review of defendants' evidence" shows that snowmobilers and other winter recreationalists may have on some isolated occasions temporarily disturbed some wolves feeding on kills; however, the "scientific evidence shows the likelihood of permanent displacement is less than minimal." Appendix hereto ("App.") 39A. "The Court finds the agency's conclusion that these

lakeshore closures are reasonably necessary to prevent incidental takings of Voyageurs wolves and bald eagles is based on little more than speculation." App. 40A. The district court gave the agency the option of engaging in additional study and factfinding and then revisiting its decision as to restricting snowmobiling on the basis of an expanded administrative record. App. 38A-39A, 41A.

The government filed a timely appeal of the summary judgment granted against it. But it elected to dismiss its appeal by motion, which the Eighth Circuit approved. App. 19A. Thereafter, on June 3, 1996, the Eighth Circuit issued its opinion deciding the interlocutory appeal (No. 95-1201) of certain environmental protectionist groups including the Voyageurs Region National Park Association (the "Protectionists") of the district court's decision denying mandatory or permissive intervention. App. 43A. The district court had allowed the Protectionists full participation in briefing and oral argument as amici curiae. Over one dissenting vote and with the assistance of a special concurrence, a three-judge panel of the Eighth Circuit held that the Protectionists had the right to intervene. App. 43A.

The Protectionists proceeded to prosecute the appeal on the merits in the absence of the government defendants. In the meantime, the government defendants followed the district court's suggestion to engage in further study and factfinding and held hearings on same in the fall of 1996. See infra note 1.

On September 23, 1997, the Eighth Circuit reversed the district court's summary judgment on the merits and directed that "judgment be entered in favor of the federal defendants and the intervenors." App. 17A. The panel reasoned that it had subject matter jurisdiction even though the federal defendants had dismissed their own appeal and had therefore agreed to be bound by the district court's judgment striking the Lakeshore Closure as arbitrary and capricious. While

conceding that the evidence in the administrative record was "not overwhelming" or "definitive," the panel upheld the Lakeshore Closure as having a rational basis. App. 16A-17A.

A cover letter from the Eighth Circuit advised the parties that the presence (such as it is) of the U.S. government as a party in this case triggers a forty-five day period (rather than the standard fourteen day period) for filing a rehearing petition. App. 78A-79A; Fed. R. App. P. 40(a). The Snowmobilers filed a timely petition for rehearing by the panel and for rehearing en banc on November 7, 1997. The Eighth Circuit denied rehearing by order filed December 3, 1997. App. 77A.

REASONS FOR GRANTING THE WRIT

"In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary?" Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1072 (1997). In its haste to reach and decide a matter of great political controversy in Minnesota, the Eighth Circuit lost sight of this most basic principle.

The executive branch of the United States made a political decision to drop its efforts to enforce a broad Lakeshore Closure on the basis of the existing administrative record. Instead, it went back to the drawing board to reconsider the issue on the basis of more investigation and discussion. Such a tactic allows political controversies to cool while discussion and factfinding lead to solutions that are politically viable as well as rationally based. The judicial branch, unfortunately, vetoed this executive choice. It fanned the flames of political controversy by allowing a private intervenor to follow the very course abandoned by the executive branch: that of litigating the rationality of the Lakeshore Closure on the basis of the existing administrative record. This Court should grant

certiorari and should decide whether the judiciary improperly invades the executive branch's powers when the judiciary grants a private petition to uphold regulations abandoned by an agency.

By deciding this issue, the Court will resolve an important intercircuit conflict over the continuing viability of the Court's decision in Diamond v. Charles, 476 U.S. 54 (1986). There, this Court held that because a "private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," a private citizen cannot continue to litigate a set of regulations abandoned by the government. The Eighth Circuit's decision below joins precedent in the D.C. and Ninth Circuits that limits the Diamond decision to its facts. The First and Sixth Circuits, by contrast, recognize the broad and unequivocal vitality of the Diamond holding.

Apart from this critical jurisdictional issue, this case presents two other issues of national importance that compel certiorari. First, in an opinion handed down after the present case was decided, this Court held that those who challenge wildlife protections as too protective of wildlife may attack agency action as violating the strictures of the Endangered Species Act ("ESA"), including the requirement to use the best scientific evidence. Bennett v. Spear, 117 S. Ct. 1154 (1997). The Eighth Circuit's decision below allows the government to circumvent these strictures by calling its actions temporary land use measures under the NPS Organic Act of 1916. This effectively undercuts Bennett. In addition, it is dubious at best to assume that the drafters of the 1916 Act, all of whom were born and raised in the nineteenth century, intended more protections of wildlife than did the environmental crusaders who sponsored the 1973 ESA.

Second, the Eighth Circuit's opinion threatens to eviscerate the arbitrary-and-capricious standard of review. However reluctant the appellate court is to invite still more Voyageurs Park litigation, where, as here, the government

regulations elevate anecdotes about the mere inconvenience of individual wolves over all the available scientific evidence showing absolutely no cause for concern about the effect of snowmobiling on wolves, the reviewing court has no choice but to declare the regulations arbitrary and capricious. The Eighth Circuit's contrary opinion can be cited to support the most whimsical government action.

I. A PRIVATE PETITION TO UPHOLD ENVIRONMENTAL REGULATIONS NOW ABANDONED BY THE PARK SERVICE DOES NOT PRESENT AN ARTICLE III CASE OR CONTROVERSY.

The administrative action that created a case or controversy was the National Park Service's ("NPS'") decision to close lakeshore areas to snowmobiling. The basis for the Lakeshore Closure was a mandatory biological opinion from the Fish and Wildlife Service ("FWS") under the Endangered Species Act (the "ESA"). Snowmobiling allegedly threatened to "take" too many wolves within the meaning of the Endangered Species Act. The Snowmobilers filed the required prelitigation notice under the ESA, 16 U.S.C. § 1540(g)(2)(A)(i), and litigated the matter. The district court found that there was simply no basis for the government's actions under the ESA and found that the Lakeshore Closure was arbitrary and capricious. Citing Federal Power Comm'n v. Transcontinental Gas Pipe Line, 423 U.S. 326, 331 (1976), the district court then remanded the matter to the Fish and Wildlife Service (the "FWS") and to the National Park Service (the "NPS") "to supplement the administrative record." App. 38A-39A. The district court enjoined the Lakeshore Closure, but only "[p]ending a sufficient explanation for the closures." App. 41A.

At this point the government had to make an important political choice. It could study the matter further and determine whether to resume the Lakeshore Closure in some form on the basis of a supplemented administrative record. Or, by taking an appeal to the Eighth Circuit, it could insist that the current record sufficed. By dropping its appeal to the Eighth Circuit, the government chose the first option. Indeed, the Court can take judicial notice that the NPS studied the matter further and on the basis of new data offered for public comment a more limited closure.[1]

In the meantime, the government asked for a voluntary closure of some of the lakeshore snowmobiling areas.[2] However, this rulemaking process was never completed

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[1] In October 1996, the NPS produced additional data purporting to show that wolves avoided human contact and that such avoidance might disturb wolves from fully feeding on kills. NPS, Restricted Winter Use Report: Voyageurs National Park (October 1996). The empirical data was roundly criticized by Dr. Mech and other wolf biologists at a public hearing. The report itself admitted that it did "not prove harm to wolves." Id. at p.3. The Snowmobilers urged the NPS to conduct further research, subject that research to proper peer review, and to consider focusing on one bay so as to produce more valid data with minimum disturbance of the status quo. The Midwest Field Area of the NPS applied for research funding in the amount of $298,500 to study gray wolf management at the Voyageurs National Park and at Pictured Rocks National Lakeshore.

[2] The original plan was to order the closure of 11 bays, as opposed to the 17 bays closed in the January 1991 regulations struck down by the district court. In response to public comment, the NPS withdrew this proposal and instead issued a notice that the 11 bays would be subject to a "voluntary" closure. Given the complete lack of basis for a voluntary closure of this scope, and the failure of the NPS to meet the Snowmobilers halfway with a more limited closure and better research subject to peer review, the measure was extremely unpopular. NPS issued a report finding increased snowmobile activity in all 17 bays during the 1996-97 winter. James Schaberl & Roger Andrascik, 1997 Addendum to Restricted Winter Use Report.

because the Eighth Circuit allowed the Protectionists to overrule the government's political decision to abandon the administrative regulations at issue and to go back to the drawing board.

It should be noted that the Protectionists have never claimed, and the Eighth Circuit did not hold, that it was arbitrary and capricious or in any was unlawful for the government to make the political choice it did. The Protectionists never served notice under the ESA that the government's action in dropping the appeal violated the ESA. 16 U.S.C. § 1540(g)(2)(A)(i). Indeed, the Protectionists ran away from the ESA during the appeal and, as will be discussed further below, emphasized the NPS' broad discretion under its 1916 Organic Act to "temporarily" close the lakeshore areas to snowmobiling as a prudent land use decision. The Eighth Circuit never reached the ESA issue and sustained the Lakeshore Closure under the Organic Act. App. 12A-17A

In short, the Court is presented with a fact pattern where the executive branch of government made a pure political choice to abandon a regulation pending further study. Does a private party have the right to overrule that political choice? And does the judiciary, when it allows the private party to overrule that choice -- by rendering a decision telling the executive branch that it did not have to abandon the regulations if it really did not want to -- improperly exceed its powers and intrude upon the prerogatives of the executive?[3]

---

[3] The intrusion might also be conceived as an invasion of the legislative branch. In issuing its gratuitous, advisory opinion that the executive need not abandon the regulations at issue, the Eighth Circuit acted as a "monitor[ ] of the wisdom and soundness of Executive action; such a role is appropriate for Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful government action." Allen v. Wright, 468 U.S. 737, 760 (1984) (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)).

This Court answered this question in Diamond v. Charles, 476 U.S. 54 (1986). Several circuits, including the Eighth Circuit, have ignored the spirit of this decision and have essentially limited the case to its facts. Other circuits have more faithfully followed the Court's directives in Diamond. Given this intercircuit conflict, given the resulting questions as to the continuing vitality of a Supreme Court case decided twelve years ago, and given the important constitutional issues raised in this case about the separation of powers between the judicial and executive branches of government, the Court should grant certiorari.

In Diamond, a pediatrician successfully challenged an Illinois statute imposing criminal liability on physicians for violating prescribed standards of care for performing abortions. Another pediatrician, Diamond, intervened in the case as a physician who supported the statute and who conscientiously objected to abortion. The State chose not to appeal the Seventh Circuit's affirmance of the trial court's permanent injunction against the statute. Diamond, as a party intervenor, appealed.

This Court held that once the State abandoned prosecution of the statute at issue by not appealing the appellate court's decision, there was no longer an Article III case or controversy.[4] Because "a private citizen lacks a

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[4] The particular Article III doctrine applied by the Court was standing to sue. Diamond, 476 U.S. at 61-62. The Court has noted elsewhere, however, the overlapping nature of standing, mootness, ripeness, and political questions, which "cluster about Article III" and which ultimately are expressions of one jurisprudential concern: the "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." Allen, 468 U.S. at 751 (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir.) (Bork, J.), cert. denied, 464 U.S. 828 (1983)). Accordingly, the Snowmobilers have framed the issue in its broadest possible terms as an "Article III" issue, not as a "standing" issue. The present case may provide the Court with a useful opportunity to better articulate the

judicially cognizable interest in the prosecution or nonprosecution of another," a private citizen cannot continue to litigate a set of regulations abandoned by the government. Diamond, 476 U.S. at 64. Otherwise, the private citizen would, in effect, be given the State's exclusive power to prosecute another. Id. The Court's reasoning expressly extended to government abandonment of civil as well as criminal regulations.

> The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests. But 'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601, 102 S. Ct. 3260, 3265-66, 73 L. Ed. 2d 995 (1982).

Diamond, 476 U.S. at 65.

Here, the government made a political decision to abandon the Lakeshore Closure and to accept the district court's rulings. As suggested by the district court, the government started the long and delicate process of further study, building a more compelling administrative record, and building some consensus that would support a more limited

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boundaries between standing and the other doctrines subsumed by the "case or controversy" requirement of Article III.

Lakeshore Closure. The Protectionists lack the power and standing necessary to second-guess that political decision.[5]

The Eighth Circuit distinguished Diamond, reasoning that the Protectionists were not seeking to reinstate the Lakeshore Closure and thereby to prosecute the Snowmobilers under a previously abandoned legal code. Rather, the Protectionists "were merely seeking to protect its own interests in wildlife conservation and to ensure that the government's discretion to promulgate regulations in furtherance of these objectives is not improperly restricted." App. 10A. That is, the Protectionists were not seeking to force the government to reinstate the Lakeshore Closure, they were merely seeking to obtain a

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[5] The issue should be framed more precisely as one of "mootness" rather than of "standing." In an earlier, interlocutory appeal, the Eighth Circuit found that the Protectionists enjoyed the same injury and Article III standing as were enjoyed by the Snowmobilers. App. 56A. The Snowmobilers did not seek review of this ruling and therefore do not, strictly speaking, challenge the "standing" of the Protectionists to intervene in the case in the first instance. What the Snowmobiles contest is whether the Protectionists maintained this standing over time. This is the definition of mootness. Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1069 n.22 (1997) ("Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'") (citations omitted). In particular, once the government dismissed its appeal of the merits, the Protectionists lost their standing, and the case became moot. The interlocutory appeal did not decide this issue because the government's dismissal of the case occurred well after the case was briefed, argued, and submitted -- and shortly before the panel issued its opinion. The Snowmobilers did raise the issue of the effect of the government's dismissal in a petition for rehearing, which was denied. This issue was then fully briefed and argued before the subsequent panel that filed the September 1997 opinion that is the subject of this petition. App. 1A. The panel deemed it proper to reach and decide the mootness issue, App. 9A, which is now properly before this Court. See Preiser v. Newkirk, 422 U.S. 395, 401 (1975) ("an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

declaration that the government could reinstate the Lakeshore Closure if it really wanted to. In other words, the Eighth Circuit attempts to escape the Diamond challenge by confessing that it is rendering a purely advisory, academic decision. Yet, if a petition to tell the government to reinstate the Lakeshore Closure is not a sufficiently concrete case or controversy within the meaning of Article III, why is a petition to tell the government to reinstate the Lakeshore Closure, but only if it really wants to, a sufficiently concrete case or controversy? If anything, such an academic issue is less worthy of Article III jurisdiction.[6]

The Eighth Circuit's decision cannot be reconciled with Diamond. In essence, the Eighth Circuit has limited to its facts a recent, unanimous judgment of this Court.[7] Courts in

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[6] Rendering an opinion on academic issues exceeds the scope of Article III jurisdiction because it would violate the rule against rendering advisory opinions. See Muskrat v. United States, 219 U.S. 346, 362 (1911) (Article III courts will not "give opinions in the nature of advice concerning legislative [or executive] action...."). The Article III violation can also be conceived as going to the "ripeness" of the controversy. There may be no need to rule on the rationality and empirical basis of measures to restrict snowmobiling if, after study, comment, and hearing, the executive branch forges a political consensus and issues regulations to which Snowmobilers and Protectionists alike can acquiesce. See United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947) (review of Hatch Act restricting political activities of government employees not ripe until enforcement action leads to a concrete case or controversy). Finally, the Article III issue can be framed under the "political question" doctrine: rendering an opinion in these circumstances interferes with core executive branch functions, expresses "lack of respect due coordinate branches of government," and creates the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker v. Carr, 369 U.S. 186, 217 (1962).

[7] Justice White concurred in the judgment, but wrote no separate opinion. Justice O'Connor wrote a separate concurrence taking the position that Dr. Diamond should not have been permitted to intervene in the case in the first place. Chief Justice Burger and then-Justice

two other circuits have followed suit. In a decision cited by the Eighth Circuit, the D.C. Circuit allowed two industry groups to appeal a district court decision invalidating a mining regulation even though the government chose not to appeal. National Wildlife Fed'n v. Lujan, 928 F.2d 453 (D.C. Cir. 1991). The D.C. Circuit reasoned that because the government had not yet promulgated a new regulation removing the invalid portion of the stricken regulation, the intervenors "could benefit from an appellate decision reversing the district [court] ... and upholding the current regulation." Id. at 456 n.2. Such reasoning would justify suit by nearly any litigant with an academic issue and an ax to grind. Any litigant potentially affected by government regulations would "benefit" from an appellate decision upholding that litigant's point of view; but unless there is a concrete case or controversy in the form of an extant government regulation, the case may not proceed.[8]

Apart from being unreconcilable with Diamond and with a centuries-old tradition of this Court to eschew academic issues[9], the reasoning of the D.C. and Eighth Circuits makes little practical sense from the separation of powers perspective that ultimately defines whether a justiciable case or controversy exists. Allen, 468 U.S. at 750 ("the 'case or

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Rehnquist joined Justice O'Connor's opinion. No justice questioned the Article III analysis of Justice Blackmun's opinion that is relevant to the present case.

[8] See supra note 6.

[9] "The ban on advisory opinions traces from the Supreme Court's celebrated refusal under Chief Justice Jay to advise President Washington informally on questions relating to the neutral status of the United States in the European war of 1793, and from the earlier refusal by members of that same Court to give extrajudicial advice to Congress and the Secretary of War on pension applications[.]" Laurence H. Tribe, American Constitutional Law § 3-9 at 73 (2d ed. 1988) (citing for latter proposition Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n. (a) (1792)).

controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded"), 752 ("the law of Art. III standing is built on a single basic idea -- the idea of separation of powers"); see supra note 4. Just because the executive branch has not immediately shot from the hip with a new regulation does not mean the judiciary should feel compelled to fill the regulatory void with its own views on the matter. Prosecutorial discretion goes to the essence of executive power. The executive should be permitted to have no regulation, to study the matter, and to buy time while it attempts to build a factually and politically supportable solution. Regulatory voids are not necessarily bad things.

By limiting to its facts this Court's unanimous judgment in Diamond, the Eighth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Supreme Court Rule 10(c). The Eighth Circuit has, furthermore, "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Supreme Court Rule 10(a).

In particular, the D.C., Eighth, and Ninth Circuits have allowed private litigants to appeal regulations abandoned by the promulgating agency. National Wildlife Fed'n v. Lujan, 928 F.2d 453 (D.C. Cir. 1991) (discussed, supra); Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) (case at bar); Yniguez v. State of Arizona, 939 F.2d 813 (9th Cir. 1991) (Governor and Attorney General did not appeal and acquiesce in judgment invalidating amendment to Arizona Constitution declaring English as the State's official language; Ninth Circuit allows sponsors of ballot initiative creating amendment to appeal in government's absence to seek to sustain

amendment), aff'd on reh'g, 965 F.2d 783 (9th Cir), cert. denied, 506 U.S. 1020 (1992).[10]

The First and Sixth Circuits have applied Diamond to dismiss a private litigant's appeals under materially identical fact patterns. United States v. AVX Corporation, 962 F.2d 108 (1st Cir. 1992) (Intervenor National Wildlife Federation seeking to maximize cleanup effort in CERCLA case could not appeal case once government entered into consent decree); Associated Builders & Contractors v. Perry, 16 F.3d 688 (6th Cir. 1994) (Industry trade association intervenes to support enforcement of State apprentice and training code against recalcitrant contractors; held: Diamond precludes trade association from appealing, in the absence of State, the dismissal of State's enforcement action). The Court should therefore grant the writ of certiorari and resolve the intercircuit conflict.

II. ANY WILDLIFE PROTECTION MEASURES UNDER THE 1916 ORGANIC ACT MUST CONFORM TO THE STRICTURES OF THE 1973 ENDANGERED SPECIES ACT.

Similar to its decision on the threshold jurisdictional issue, the Eighth Circuit's decision on the merits contradicts the recent holdings of this Court on matters of national importance. In particular, the panel chose to affirm the

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[10] This Court reviewed a judgment entered in subsequent proceedings in this case and held that the case became moot once the State employee who commenced the action on the grounds of fear of prosecution under the official language law resigned her State job. Arizonans for Official English v. Arizona, 117 S. Ct. 170 (1997). Although highly critical of the Ninth Circuit for unnecessarily reaching and deciding constitutional issues, the Court did not reach, review, or comment upon the Diamond v. Charles issue decided in the previous Ninth Circuit opinion.

Lakeshore Closure as an exercise of the broad discretion for temporary land use measures accorded the NPS under the authority of its 1916 Organic Act. The decisions of this Court hold that the Endangered Species Act of 1973 (the "ESA") is the governing statute, that those who challenge park action as too protective of species may proceed under the ESA, and that land use action protective of species must pass muster under the best scientific evidence standard mandated by the ESA. The Eighth Circuit's refusal to review the Lakeshore Closure under the ESA contradicts these precedents and requires a writ of certiorari pursuant to U.S. Supreme Court Rule 10(c). In addition, the Eighth Circuit's novel suggestion that the Congress of 1916 intended to be more protective of species such as wolves, spotted owls, and snail darters than did the Congress of 1973 presents an issue of national importance "that has not, but should be, settled by this Court." U.S. Supreme Court Rule 10(c).

This Court has made clear that "the language, history, and structure of the [ESA] indicate[ ] beyond doubt that Congress intended endangered species to be afforded the highest of priorities." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 174 (1978). The ESA's "very words affirmatively command all federal agencies to 'insure that all actions'" follow the ESA and "[t]his language admits of no exception." Id. at 173 (quoting 16 U.S.C. § 1536).

It follows from this that the ESA controls over any agency's organic act. The ESA deliberately omits any "qualifier" that a federal agency may act consistent with its primary purpose and "omitting this qualifier avoids . . . any 'congressional policy that other agency purposes are necessarily more important than protection of endangered species and would always prevail if conflict were to occur.'" Tennessee Valley, 437 U.S. at 182 (quoting 1972 House Hearings 335). In the Court's view, Congress made a

"conscious decision . . . to give endangered species priority over the 'primary missions' of federal agencies." Id. at 185.

The Eighth Circuit believed that the Lakeshore Closure did not have to be tested under the ESA if it passed muster under the Park Service's Organic Act. It may have assumed, therefore, that the ESA could not possibly be less protective of species than the Organic Act (as broadly, and, the Snowmobilers submit, wrongly construed by the Eighth Circuit). That is, if the Lakeshore Closure was permitted under the Organic Act, it was, a fortiori, permitted under the ESA.

This assumption is contradicted by the Supreme Court's decision in Bennett v. Spear, 117 S. Ct. 1154 (1997), which was handed down after the case below was briefed and argued to the panel. Bennett makes clear that the environmentally incorrect -- those seeking to challenge a measure protecting species as too protective -- have standing to do so under the ESA. Here, the Snowmobilers clearly have standing under the ESA and can enlist the requirement that the "best scientific evidence" be used to justify the agency action. Where, as here, the agency disregards its previous biological opinions, acts contrary to the recommendations of its own wolf biologists, and relies on nothing more than rumor to justify its action, it violates the best scientific evidence standard.

The Eighth Circuit, however, points out that the Park Service should have the discretion to take reasonably protective, prudent measures so that species are not damaged while we wait around for all of the data that would satisfy a conservative scientist. This, however, ignores the context of the current administrative action. Here the agency had already generated decades of data and had already concluded that closure to snowmobiling was not justified. Where, as here, the agency does an "about face," the standard of review is more rigorous. When an agency changes course by reversing policy, it must supply a reasoned analysis for the change. Motor

Vehicle Mfg. Ass'n v. State Farm Mut. Auto Ins., 463 U.S. 29, 42 (1983); Defenders of Wildlife v. Administrator Envtl. Protection Agency, 688 F. Supp. 1334, 1347 (D. Minn. 1988), aff'd in part and rev'd in part on other grounds, 882 F.2d 1294 (8th Cir. 1989). A vague fear that maybe more snowmobiling might inconvenience some itinerant wolf, in face of years of empirical data and administrative findings that snowmobiling was not causing any problems for wolves, does not constitute a reasoned analysis.

It may well be, however, that the assumption behind the Eighth Circuit's decision was that the ESA was less protective of species than the Organic Act (again, as broadly and, the Snowmobilers submit, wrongly construed by the Eighth Circuit). This is a theme implicit in the Protectionists' analysis, who, after championing the ESA for many years, have cooled on the Act given the ability of the environmentally incorrect to use the rigorous analysis required by the ESA to challenge wildlife protection. Indeed, this fear was confirmed when this Court handed down Bennett after the present case was briefed and argued. There, the Court stressed that the "obvious purpose of this [best evidence requirement] is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise . . . [and] to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." Bennett, 117 S. Ct. at 1168. To circumvent this new application of the ESA now approved by this Court through the device of calling the measure a temporary land use action under Organic Act sets a significant precedent worthy of certiorari under Supreme Court Rule 10(c).

And to hold that a 1916 Organic Act is actually more protective of the likes of the wolf, the spotted owl, and the snail darter than the 1973 ESA sets a dubious precedent at best. The congressmen who were born and raised in the nineteenth century who passed the NPS Organic Act of 1916

did not intend to grant more protections to species than did the environmentally sensitive sponsors of the ESA of 1973.

The primary concern of the 1916 Act establishing the NPS was promoting tourism within the United States. Both the House and Senate Committees on the Public Lands highlighted encouraging visitors to the parks.

> The great trend toward the parks means retaining in this country the millions expended by our tourists in foreign travel previously spent abroad. This economic value of the parks is only recently coming to be realized.

H.R. Rep. No. 64-700, at 2 (1916); S. Rep. No. 64-662 at 1 (1916) (expressly adopting House Committee report); see also H.R. Conf. Rep. No. 64-1136, at 2 (1916) ("Whenever the needs of tourism make the granting of grazing permits inadvisable the Secretary of the Interior would, of course, deny admission of live stock to the park.").

If anything, the bill discussion is notable for the absence of debate on encouraging species conservation. No one discussed preserving species -- let alone a particular number within one species. The debate revolved around dividing nature for grazing. 53 Cong. Rec. 10363 (July 1, 1916) (Rep. Kent) (noting areas "where the grass goes to waste" and needs grazing); Id. at 10364 (July 1, 1916) (Rep. Hayden) (encouraging grazing near Grand Canyon). Similarly, on the Senate Floor, the only reference to preservation concerns protecting "wild game" from grazing animals. 53 Cong. Rec. S12151 (Aug. 5, 1916) (Sen. Clark) (opposing widespread grazing in Yellowstone because of levels of "wild game"). Preserving "wild game" for hunting hardly supports a broad conservation of individual species, especially compared to the explicit congressional concern with species in the ESA.

The lack of any intent on the part of Congress to protect endangered species that the draftsmen referred to as "game" is confirmed by a closer look at the Organic Act. Contrary to the contentions of the Protectionists, the Organic Act did not give the NPS the discretion to do whatever it wanted to protect species. Rather, the Organic Act requires the NPS to balance wildlife protection against the need to promote the use and enjoyment of park lands by people. The NPS' mandate is not to board up the Park to protect wildlife; the Organic Act requires the NPS to "promote and regulate the use" of national parks by humans. 16 U.S.C. § 1. The Eighth Circuit ignored the necessity of balancing speculative concerns about wildlife with the need to promote access to and use of the Park.[11] In the winter, this requires a snowmobile -- and snowmobiling was a use explicitly authorized and contemplated by Congress when it created Voyageurs Park. See 16 U.S.C. § 160h.

The Eighth Circuit erred in reading too much into the general language of the 1916 Organic Act. The text of the Act simply requires appropriate balancing of recreational use of park lands and protection of wildlife. The legislative history indicates that, if anything, the former interest prevailed. Be that as it may, where, as here, there is a far more recent and specific act of Congress governing the balancing of wildlife protection and other agency concerns (such as park use and recreation), the focus of inquiry should be on that act of

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[11] See Universal Interpretive Shuttle v. Washington Metro. Area Transit Comm'n, 393 U.S. 186, 187 (1968) (NPS charged with "providing facilities and services for their public enjoyment"); Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065, 1072-73 (9th Cir. 1997) (upholding commercial fishing in non-wilderness areas as not derogating park values); National Wildlife Fed'n v. National Park Service, 669 F. Supp. 384, 390 (D. Wyo. 1987) ("While the Park Service is clearly responsible for the preservation of grizzly bears, it is also charged with promoting and providing for the enjoyment of park resources. . . . It seeks a balance between preservation and promotion").

Congress. Rather than shift inquiry to the 1916 Organic Act and interpret it as more or less protective of species than the ESA (depending upon the desired result), courts should recognize the 1916 Organic Act as a general statement of policy which must defer to the specific wildlife protection tests mandated by the 1973 ESA.

In sum, the Eighth Circuit's decision will allow the government to prevent any meaningful review of its actions as too protective of endangered or threatened species. In particular, the decision allows the government to escape any scrutiny under the ESA by calling its actions temporary land use measures under the NPS Organic Act and by defining that act as according near limitless discretion. This is contrary to this Court's recent decision in Bennett allowing the environmentally incorrect to challenge government action under the ESA as too protective of species. This is a matter of national importance that requires review by certiorari.

III. A PARK CLOSURE TO PROTECT THREATENED SPECIES THAT IS BASED PURELY ON ANECDOTAL EVIDENCE OF MERE INCONVENIENCE TO INDIVIDUAL ANIMALS, THAT INCLUDES NO FINDING OF HARM TO SPECIES POPULATIONS, THAT REVERSES LONGSTANDING ADMINISTRATIVE PRACTICE, THAT FAILS TO CONSIDER THE INTEREST IN RECREATIONAL USE OF AND ACCESS TO THE PARK, AND THAT IS OPPOSED BY THE GOVERNMENT'S OWN WILDLIFE PERSONNEL IS ARBITRARY AND CAPRICIOUS.

Leaving aside the issue of whether a wildlife protection measure must conform to the strictures of the ESA, and

approaching the issue as purely one of determining whether the agency action was arbitrary and capricious, one can only be disturbed by the implications of the remarkable deference paid the agency action by the Eighth Circuit. As a practical matter, there is little left of judicial review of agency action if this kind of action passes muster under the arbitrary and capricious standard. Even the panel below apologizes for the weakness of the basis provided for the Lakeshore Closure. See App. 16A (characterizing basis as "not overwhelming").

The district court, by contrast, carefully reviewed the evidence and law and crafted a decision that is consistent with the administrative law precedent of this Court. The district court refused to accept the Snowmobilers' contention that administrative action could not be based on anecdotal evidence; perhaps with good reason, the court recognized that anecdotal evidence could suffice under some circumstances, though "[t]here remains, however, a deep concern whether wholly anecdotal evidence can constitute the 'best scientific and commercial data available,' required under the ESA." App. 39A. The district court then reviewed the evidence and noted the following:

- A "generous" review of defendants' evidence reveals temporary displacement of some individual wolves by recreationalists, "but scientific evidence shows the likelihood of permanent displacement is less than minimal." App. 39A.

- There is no evidence that limiting snowmobiling will improve the condition of what is a stable wolf populations. App. 39A-40A.

- "In the end, the FWS and NPS simply contend that temporary displacements of these species may evolve into permanent displacements if snowmobilers are

> allowed continued access to lakeshore trails. There is absolutely no evidence in the record to support this proposition. Indeed, the only record evidence is to the contrary: both the FWS and the NPS have reported that temporary dispersal rarely results in permanent displacement from a kill." App. 40A.

This administrative action was simply based on a prejudice against snowmobiling and on the political power of the environmentally correct. The significance of the appellate court's decision extends beyond Voyageurs Park. The Eighth Circuit has sent a clear signal that so long as the NPS calls its wildlife protective measures temporary land use restrictions under the Organic Act, there will be no meaningful judicial review. And the Eighth Circuit's decision will also become the patron saint of litigants seeking to salvage the weakest and most dubious administrative actions. Finally, the cursory review applied by the Eighth Circuit in a case where the agency has suddenly reversed its course contradicts precedent holding that a more searching review is in order. See Motor Vehicles Mfgr. Ass'n, 463 U.S. at 42; Defenders of Wildlife, 688 F. Supp. at 1347 (agency must provided reasoned explanation for about face). For these reasons, the holding is worthy of certiorari.

CONCLUSION

This Court should therefore grant the Snowmobilers a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

Corey J. Ayling
Counsel of Record
Kathleen M. Brennan
McGrann Shea Franzen Carnival
Straughn & Lamb, Chartered
2200 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Telephone: (612) 338-2525

Attorneys for Petitioners

Dated: March 3, 1998.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-1856

Jeffrey Mausolf; William Kullberg; Arlys Strehlo; Minnesota United Snowmobilers Association,	*	
Plaintiffs - Appellees,	*	
v.	*	
Bruce Babbitt, Secretary, Department of the Interior; Roger Kennedy, Director, National Park Service; Mollie Beattie, Director, U.S. Fish and Wildlife Service; Ben Clary, Superintendent, Voyageurs National Park,	*	Appeal from the United States District Court for the District of Minnesota.
Defendants;	*	
Voyageurs Region National Park Association; Sierra Club, North Star Chapter; Humane Society of the United States; Friends of the Boundary Waters Wilderness; National Park and Conservation Association; Izaak Walton; League of America,	*	
Intervenor Defendants - Appellants.	*	

Submitted: December 12, 1996
Filed: September 23, 1997

Before BOWMAN and HEANEY, Circuit Judges, and STROM,[1] District Judge.

BOWMAN, Circuit Judge.

The Voyageurs Region National Park Association and other conservation groups (collectively, "the Association") appeal from the decision of the District Court granting summary judgment to the Minnesota United Snowmobilers Association, Jeffrey Mausolf, and other individual snowmobiling enthusiasts ("the Snowmobilers"), who sued the Secretary of the Interior and other governmental defendants seeking to enjoin the enforcement of restrictions on snowmobiling in Voyageurs National Park ("the Park"). See Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996). We postponed issuing our decision in this case based on counsels' representations at oral argument that the parties hoped to negotiate a settlement. It appears, however, that the parties have been unable to reach an agreement, necessitating our resolution of this matter. We reverse.

I.

Establishment of Voyageurs National Park was authorized in 197 1. See Pub. L. 91-661, 84 Stat. 1970 (codified as

[1] The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

amended at 16 U.S.C. §§ 160-160k (1994)). Snowmobiling, which had been engaged in freely both prior to and after the Park's establishment, continued pending the results of wildlife-impact studies conducted by the National Park Service (NPS). See Mausolf, 913 F. Supp. at 1338. Although snowmobiling generally is prohibited in national parks, see 36 C.F.R. § 2.18(c) (1996),[2] the Voyageurs Park enabling legislation authorized the Secretary of the Interior to permit snowmobiling in the Park. See 16 U.S.C. § 160h (1994) ("The Secretary may, when planning for development of the park, include appropriate provisions for (1) winter sports, including the use of snowmobiles . . . .") In 1991, the NPS issued regulations, pursuant to statutory authority granted by Congress, see, e.g., 16 U.S.C. § 3 (1994), based on the results of a series of environmental- and wildlife-impact reports, allowing snowmobiling on nearly all of the Park's lake surfaces and on certain overland trails and portage routes. See 36 C.F.R. § 7.33(b). These regulations also specifically authorize the superintendent of Voyageurs National Park to close portions of the Park temporarily after "taking into consideration . . . wildlife management, . . . and park management objectives." Id. § 7.33(b)(3). The Association filed suit in federal court claiming that, because the NPS failed to prepare a wilderness plan outlining the effects of the proposed regulations, the regulations were illegal. In an unpublished opinion, the District Court ordered that a wilderness plan be prepared and submitted as required by applicable regulations, but refused to enjoin snowmobiling in the Park. Voyageurs Region Nat'l Park Ass'n v. Lujan, No. 4-90-434, 1991 WL 343370, at *11-14 (D. Minn. Apr. 15, 1991), aff'd, 966 F.2d 424 (8th Cir. 1992).

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[2] All citations refer to the Code of Federal Regulations revised as of October 1, 1996. The pertinent sections have not been amended since the time period relevant to this case.

In August 1991, the NPS, in accordance with the District Court's order, proposed a draft wilderness plan which reduced the Park areas available for overland snowmobiling but permitted the activity on major lakes, some designated portage routes, and the Chain of Lakes Trail. The NPS made this recommendation after concluding that snowmobiling on overland trails might adversely impact the gray wolf population. The NPS then requested a "biological opinion"[3] from the Fish and Wildlife Service (FWS) concerning the effects, if any, of the proposed action on gray wolf, bald eagle, and other animal populations in the Park. In March 1992, the FWS concluded that the NPS's proposed wilderness plan would not jeopardize the animals' survival or adversely affect their critical habitats. However, the FWS acknowledged that snowmobiler disruption of wolves while hunting prey, although likely insignificant in isolation, could lead to cumulatively significant negative effects if the disruptions were frequent. The FWS directed that the NPS close specific trails, lakeshores, and lakes to snowmobiles and other motorized vehicles, including areas that had been exempted from closure under the NPS's originally submitted wilderness plan.

Thereafter, in December 1992, Park officials issued an order[4] closing sixteen of the Park's lake bays and certain

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[3] Under 16 U.S.C. § 1536(a)(2) (1994), each federal agency must consult with the Fish and Wildlife Service (FWS) prior to taking any action "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." After such consultation, the FWS provides "a written statement setting forth the [FWS's] opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." Id. § 1536(b)(3)(A).

[4] The closure order was issued through "The Compendium for Voyageurs National Park," a document published annually and operating as the summary of the rulemaking implemented under the discretionary authority of the Park Superintendent. This document "serves as public

shoreline areas to snowmobiling pursuant to authority granted under 36 C.F.R. § 7.33(b)(3) (authorizing temporary closure of lake surfaces for wildlife-management purposes). This order, which was renewed in 1993 and 1994, reduced the Park areas available for snowmobiling.[5] In 1994, the FWS supplemented its biological opinion, stating that the lakeshore closures were designed to minimize the harm, harassment, and taking of gray wolves. The FWS, expressing its intent to reduce adverse human/wolf contact, explained that while snowmobiles themselves do not adversely impact the gray wolf, the vehicles provide access to remote wolf-habitat areas for individuals who could intentionally or unwittingly harm the species or its individual members. Five "incidents that constitute take by the harassment or harming of gray wolves,"[6] and "numerous additional reports of harassment of gray wolves, . . . most of which are anecdotal and not well documented," were cited by the FWS as support for the closures. 1996 Supplement to Biological Opinion at 6. The

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notice" and "contains only a few of the laws and regulations pertaining to the administration of the park." 1993 Compendium. The compendium is intended to be "used in conjunction with Title 36, Code of Federal Regulations, sections 1 through 7." Id.

[5] The restricted use areas account for seven percent of the Park's total water acreage and three percent of the Park's total acreage. See Mausolf, 913 F. Supp. at 1340 n.9.

[6] The definition of "take" is "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1994). "Harass" is further defined to include any act that "creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3. "Harass" is defined as an act "which actually kills or injures wildlife" and may include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." Id.

FWS revised its initial incidental take statement,[7] reducing the permissible number of incidental takings of gray wolves from six wolves to two wolves per year.

In January 1994, the Snowmobilers sued the Secretary of the Interior and other governmental defendants claiming that the FWS's biological opinion did not support the closures ultimately ordered, and that the closures were therefore arbitrary, capricious, and in violation of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994) (ESA), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994) (APA). The Snowmobilers argued that the Secretary, through the NPS and the FWS, had engaged in an unexplained and unwarranted "about face" on the snowmobiling issue and had not considered the best available scientific and commercial information before issuing the new restrictions. The Association, hoping to defend the closures, moved to intervene, arguing that the NPS had historically permitted unrestricted snowmobiling in the Park despite regulations prohibiting such activity and despite its adverse environmental effect, and that the NPS could not be counted on to protect the Association's interests in wildlife conservation and enjoyment of the Park.

The District Court denied the Association's motion to intervene, noting that under the parens patriae doctrine, governmental entities are presumed to represent the interests

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[7] If the FWS concludes in its biological opinion that the proposed agency action is not likely to jeopardize the continued existence of the species as a whole, but may result in the taking of individual members of the species, the FWS must prepare an incidental take statement which permits an agency to "take" individual members of a protected species if the taking is not the purpose of the action and is therefore "incidental" to the agency action. See 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 17.3, 402.14(1). This statement from the FWS authorizes the agency to take a limited number of animals, determined by the FWS, if the agency complies with certain terms and conditions. See 16 U.S.C. §§ 1536(o)(2), 1536(b)(4) (1994).

of all their citizens. See Mausolf v. Babbitt, 158 F.R.D. 143, 147-48 (D. Minn. 1994). The Association appealed the District Court's decision denying its motion to intervene, and we reversed, holding that the Association possessed the requisite Article III standing to intervene and that the Association had rebutted any presumption that the governmental entities would adequately represent its interests. See Mausolf v. Babbitt, 85 F.3d 1295, 1304 (8th Cir. 1996).

While the Association's appeal on the intervention issue was pending before this Court, the District Court issued its decision on the merits of the Snowmobilers' challenge to the NPS's Park closure regulations. See Mausolf v. Babbitt, 913 F. Supp. 1334 (D. Minn. 1996). The District Court, relying solely on the provisions of the ESA, enjoined enforcement of the Park closure regulations, noting that the government "failed to explain adequately the reasons for the closures" and that the "evidence presently in the record is inadequate to establish that curtailing snowmobiling will improve the condition" of the gray wolf population. Id. at 1343-44. Because it appeared that the Association's intervention appeal would not be decided by this Court before the expiration of the time period for filing a notice of appeal from the District Court's merits decision, and because the Association wished to preserve its right to appeal the District Court's decision on the merits should its motion to intervene be granted on appeal, the Association timely filed a notice of appeal from the District Court's decision on the merits. The governmental defendants likewise filed a notice of appeal from this decision, but eventually dismissed their appeal. The Association, having been granted the right to intervene by this Court, now appeals the District Court's judgment on the merits.

II.

We initially address the Snowmobilers' contention that we lack jurisdiction to entertain this appeal. The Snowmobilers first argue that because the Association was not a party to the litigation when its notice of appeal from the merits decision was filed and did not become a party until after the time period for filing had expired, the Association's notice of appeal was ineffective and we therefore lack jurisdiction to consider this appeal. We disagree.

"If final judgment is entered with or after the denial of intervention, . . . the applicant should be permitted to file a protective notice of appeal as to the judgment, to become effective if the denial of intervention is reversed." 15A Charles Alan Wright et al., Federal Practice and Procedure § 3902.1, at 113 (2d ed. 1991). A contrary rule would prevent a prospective intervenor who successfully appeals the district court's denial of his intervention motion from securing the ultimate object of such motion--party status to argue the merits of the litigation--if, as was the case here, the appellate court does not resolve the intervention issue prior to the district court's final decision on the merits. The Snowmobilers, in support of their argument against jurisdiction, direct our attention to Jenkins v. Missouri, 967 F.2d 1245 (8th Cir.), cert. denied, 506 U.S. 1033 (1992), for the proposition that the Association's notice of appeal was not timely and therefore not effective. Contrary to the Snowmobilers' characterization of Jenkins, however, the case stands merely for the proposition that if no motion to intervene is pending, a party cannot file a valid notice of appeal. See id. at 1248. Here, however, the Association was awaiting a final decision from this Court on its intervention motion when it timely filed a notice of appeal from the merits decision. "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." Marino v.

Ortiz, 484 U.S. 301, 304 (1988) (emphasis added). The Association properly became a party to this lawsuit and, as such, is entitled to appeal the judgment of the District Court.

The Snowmobilers next argue that because the government dismissed its appeal from the District Court's merits decision, "[t]he present case is over" and the Association may not appeal. Appellees' Br. at 25. The Snowmobilers, citing Diamond v. Charles, 476 U.S. 54 (1986), maintain that the effect of the government's dismissal "is that [sic] same as if the Government had formally rescinded, repealed, and abandoned its regulations." Appellees' Br. at 23. According to the Snowmobilers, "[t]hird parties," such as the Association, "do not have standing to force the government to reenact a legal code that the government has chosen to abandon." Id. Again, we disagree.

The Supreme Court noted in Diamond that "an intervenor's night to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." Diamond, 476 U.S. at 68. This Court summarized Diamond when we reversed the District Court's denial of the Association's motion to intervene, noting that Diamond stands for the proposition that "an intervenor may not appeal, or continue a suit, without the party on whose side intervention was permitted, unless [the] intervenor has Article III standing." Mausolf v. Babbitt, 85 F.3d at 1299. We determined in that appeal that "[t]he Association has alleged concrete, imminent, and redressable injuries in fact, which are neither 'conjectural' nor 'hypothetical'," so that the Association has established Article III standing to intervene in this litigation. Id. at 1302 (citation omitted).

Because we have already determined that the Association possesses Article III standing, the only question remaining is whether an Article III case or controversy remains after the NPS dismissed its appeal. We believe that it does. In holding

that the lakeshore closures violate the ESA, and in neglecting to consider the NPS's independent regulatory authority to order such closures, the District Court has directly impacted the Association's interests in observing and enjoying Park wildlife--including gray wolves--without the potential interference of snowmobiles. The District Court's ruling, effectively limiting the NPS's discretion to order such closures in the future, will likely continue to impair the Association's interests. The NPS's decision not to appeal from the District Court's adverse ruling on the merits emphasizes the disparity between its interests and those of the Association and confirms that the Association's "concrete, imminent, and redressable injuries in fact" are likely to recur. Id. at 1302.

Moreover, contrary to the Snowmobilers' assertions, the Association is not seeking to "enforce" the lakeshore closures. The Association is merely seeking to protect its own interests in wildlife conservation and to ensure that the government's discretion to promulgate regulations in furtherance of these objectives is not improperly restricted. In National Wildlife Fed'n v. Lujan, 928 F.2d 453 (D.C. Cir. 1991), a case much like the one before us, an environmental group challenged the validity of a mining regulation, and two industry associations intervened to defend the regulation. When the district court struck down the regulation, the industry groups, but not the government, appealed. The appellate court determined that the case was not moot and allowed the intervenors to act as sole appellants, reasoning that, "because the [government] has not promulgated a new regulation removing the [invalid portion of] the current regulation, [the intervenors] could benefit from an appellate decision reversing the district [court] ... and upholding the current regulation." Id. at 456 n.2. Here, the government has not revoked the closure order enjoined by the District Court, and the Association would likely benefit from our decision reversing the District Court and upholding that closure order. We conclude that because

the Association has standing to challenge the District Court's decision and timely filed its notice of appeal and because a case and controversy still exists, we have jurisdiction to consider the Association's appeal.

III.

An administrative agency enjoys broad discretion in carrying out the mandates of its governing statutes, see Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 866 (1984), and we will set aside an agency's action only upon a showing that the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A) (1994); see also Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."). The appellate court "must make an independent decision based on the same administrative record that was before the factfinder." Sierra Club v. Davies, 955 F.2d 1188, 1192 (8th Cir. 1992). This standard of review requires that the reviewing court defer to the agency's decisions in matters within its area of expertise, see Bankruptcy Estate of United Shipping Co. v. General Mills. Inc., 34 F.3d 1383, 1390-91 (8th Cir. 1994), and this Court "is not permitted to substitute its judgment for that of the agency," Sierra Club, 955 F.2d at 1192-93 (citing Citizens to Preserve Overton Park. Inc. v. Volpe, 401 U.S. 402, 416 (1971)). Regulations promulgated by an agency will be upheld if they are "'reasonably related to the purposes of the enabling legislation.'" Voyageurs Region Nat'l Park Ass'n v. Lujan, 966 F.2d 424, 427 (8th Cir. 1992) (citation omitted). "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc. v.

Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285-86 (1974) (citation omitted).

IV.

Snowmobiling is a prohibited activity in national parks except where the NPS has promulgated special regulations designating areas open to snowmobiling, and even then it is allowed only where such "use is consistent with . . . park management objectives, and will not disturb wildlife or damage park resources." 36 C.F.R. § 2.18(c). Congress endowed the Secretary of the Interior with discretion to permit snowmobiling in Voyageurs National Park when statutes establishing the Park were enacted: "The Secretary may, when planning for development of the park, include appropriate provisions for (1) winter sports, including the use of snowmobiles . . . ." 16 U.S.C. § 160h (1994). Consistent with the NPS's responsibility to manage and regulate Park resources, the NPS has been given wide latitude to make management decisions regarding the type and scope of activities permitted on Park property.

The District Court analyzed the propriety of the NPS's Park closures solely under the authority granted to the agency by the ESA and concluded that the closures were invalid. The ESA represents a congressional directive that all federal agencies "shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of [the Act]." 16 U.S.C. § 1531(c) (1994). In keeping with Congress's stated purpose to protect wildlife, the ESA prohibits federal agencies from taking any action that is "likely to jeopardize the continued existence of any endangered species or threatened species," 16 U.S.C. § 1536(a)(2) (1994),[8] and prohibits any person,

[8] The Association concedes on appeal that permitting snowmobiling in the areas previously subject to the NPS Park closure, as ordered by the

including a governmental agency, from "taking" any individual member of a threatened or endangered species population, see 16 U.S.C. § 1538(a)(1)(B) (1994) (endangered species); 50 C.F.R. § 17.31 (1995) (threatened species). Under these two provisions, the ESA operates to protect both the survival of entire populations of endangered or threatened species and the survival of individual members of each such species.

The District Court, after acknowledging that an agency's action is entitled to great deference, concluded that the NPS and FWS "failed to explain adequately the reasons for the closures," and that, therefore, the action was arbitrary and capricious. Mausolf, 913 F. Supp. at 1343. The evidence, according to the District Court, was insufficient to support the agency's action under the ESA. The District Court found that the NPS's decision to effectuate these closures was "based on little more than speculation." Id. at 1344.

The District Court, however, neglected to consider the closures in light of the NPS's authority arising from the organic act creating the NPS and the national park system, see 16 U.S.C. §§ 1, 3 (1994), from the regulations promulgated under these statutes that govern the management of all national parks, see 36 C.F.R. § 1.5(a), or from regulations promulgated to manage snowmobiling in Voyageurs Park in particular, 36 C.F.R. § 7.33(b)(3).

The regulations designating routes for snowmobiling within the Park specifically grant the Park Superintendent the discretion temporarily to close routes and lake surfaces to

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District Court, will not jeopardize the continued existence of the gray wolf. See, e.g.,50 C.F.R. § 402.02 (defining "jeopardize" to include any action that reasonably would be expected to "reduce appreciably the likelihood of both the survival and recovery of a listed species . . . by reducing the reproduction, numbers, or distribution of that species"). Therefore, we do not consider the propriety of the Park closures under provisions of the ESA prohibiting agency action likely to jeopardize the gray wolves' continued existence.

snowmobiling after taking into consideration, among other factors, park management objectives.[9] The 1992 Park closure order, on its face, declares that the order was issued "[u]nder the authority of Title 36, Code of Federal Regulations, Chapter 1, Section 7.33(b)(3)." See Addendum to 1992 Compendium. This order was renewed in 1993, see 1993 Compendium, and in 1994, see 1994 Compendium, again under the authority granted the Superintendent under § 7.33(b)(3) to mandate temporary closures to effectuate park management objectives.

The Snowmobilers argue that the challenged Park closures are outside the Superintendent's authority under § 7.33(b)(3) because there is no stated time limit on the closure order. However, these orders are issued as temporary, annual directives that must be reviewed and either renewed or repealed through yearly compendiums establishing the management goals for the Park. Nothing in the language of the closure order indicates that it is intended to operate as a permanent closure and, because the orders are issued annually, the closures will be reviewed and either renewed or modified on a yearly basis. Before the District Court enjoined enforcement of the closure order, the NPS, in conjunction with the FWS, was conducting just such a review to determine the benefits, if any, the closures have had on the wolf population and to determine whether the closures should be maintained, modified, or rescinded. Consistent with its past

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[9] 36 C.F.R. § 7.33(b)(3) grants the Superintendent authority to "temporarily close trails or lake surfaces, taking into consideration public safety, wildlife management, weather, and park management objectives." This Court has previously recognized the NPS's authority to effectuate Park closures pursuant to 36 C.F.R. § 7.33(b). See Voyageurs Region Nat'l Park Ass'n v. Lujan, 966 F.2d at 428 ("We also observe that the final regulations provide for closure of given areas to snowmobile use 'taking into consideration . . . wildlife management.'") (citing 36 C.F.R. § 7.33(b)).

practice, we hold that, under 36 C.F.R. § 7.33(b)(3), the NPS must conduct, at minimum, an annual review if snowmobile trails are to be closed "temporarily" and such decisions must be supported by the record. The annual closure order is not outside the Superintendent's authority for lack of a specific time limit.[10]

As we have previously noted, agency actions are entitled to a great deal of deference and a "reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983). A reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. at 43. This is not to say that the Superintendent's discretion to order Park closures is without limit. It must be exercised with an eye toward promoting specific regulatory objectives such as "protection of environmental or scenic values" or "protection of natural or cultural resources," 36 C.F.R. § 1.5(a), and it is subject to the arbitrary-and-capricious standard of review, see 5 U.S.C. § 706(2)(A) (1994); Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) ("The [arbitrary-and-capricious] standard mandates judicial

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[10] Under § 1.5(b), except under emergency conditions, a closure "which is of a nature, magnitude and duration that will result in a significant alteration in the public use pattern of the park area . . . shall be published as rulemaking" in the Federal Register. 36 C.F.R. § 1.5(b). In this case, however, formal rulemaking was not required before the closure order was effective. As we have previously noted, snowmobiling in Voyageurs National Park is generally prohibited absent special regulations permitting the activity. See 36 C.F.R. § 2.18(c). Although the NPS neglected to enforce this provision and allowed snowmobiling to continue despite regulations to the contrary, the subsequent closure order restricting snowmobiling does not amount to a "significant alteration" in what was previously an unlawful public use of the park.

affirmance if a rational basis for the agency's decision is presented) even though we might otherwise disagree.") (citations omitted). Whether an agency's action is arbitrary and capricious depends on whether "the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

Applying this standard to the Park closure order, we cannot say that the NPS's decision is arbitrary and capricious. The evidence in the administrative record, while not overwhelming, is sufficient to provide a rational foundation on which the NPS could base its closure order. The NPS issued its closure order under authority granted by § 7.33(b)(3) to close portions of the Park temporarily in order to further management objectives--including preservation and protection of wildlife. This conclusion was reached after consultation with the FWS and was based on biological opinions and incidental take statements issued by that agency. These reports are contained in the administrative record and establish that the closures may prevent some incidental takings of gray wolves.

In its 1992 biological opinion, the FWS noted that the use of snowmobiles in areas of concentrated gray wolf activity "has been observed to cause the temporary disruption of gray wolf [feeding] activity." Biological Opinion at 7. While the FWS concluded that this type of disruption was insignificant in isolation, it determined that continued disruption of feeding activity by snowmobiles could have significant, negative cumulative effects[11] on individual wolves, especially during severe winters when prey availability dwindles. In its 1994

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[11] The NPS must consider "cumulative effects" of proposed actions within national parks on endangered or threatened species. 50 C.F.R. § 402.14(g)(3).

supplement to this biological opinion, the FWS noted that "[s]everal cases of harassment and harming of gray [wolves] have been reported within the Park in past years," and that "[i]n each documented case, access was gained to gray wolf habitat by motorized vehicle." 1994 Supplement to Biological Opinion. The FWS concluded that "[t]he problem lies with providing human access to gray wolf habitat that would not be provided without motorized vehicles." Id. A number of specific incidents are recounted, along with anecdotal evidence that harassment of gray wolves is not "an unheard of event." Id. at 5. While this evidence is not definitive, it does provide a rational basis on which the NPS could have concluded that the Park closures were a reasonable solution to the problem of gray wolf harassment.

The absence of definitive, irrefutable evidence in the record to establish the adverse connection between snowmobiling and incidental taking of gray wolves is not fatal to the NPS's closure order, since a reviewing court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc., 419 U.S. at 286. We conclude that the evidence in the administrative record on which the NPS based its decision to order the Park closures was sufficient to justify the determination and that the action was not arbitrary or capricious.[12]

Because the administrative record supports the closures as measures taken to protect wildlife under 36 C.F.R. § 7.33(b)(3), and under other regulatory provisions, see 36 C.F.R. §§ 1.5, 2.18, we reverse the judgment of the District Court and direct that judgment be entered in favor of the federal defendants and the intervenors.

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[12] Because we conclude that the park closure is within the discretion granted to the NPS under other statutory and regulatory authority, we decline to consider the propriety of this closure under the ESA.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-1858MND

Jeffrey Mausolf; William Kullberg; Arlys Strehlo; Minnesota United Snowmobilers Association,	*	
Appellees,	*	Appeal from the United States District Court for the District of Minnesota
v.	*	
Bruce Babbitt, Secretary, Department of the Interior; Roger Kennedy, Director, National Park Service; Molie Beattie, Director, U.S. Fish and Wildlife Service; Ben Clary, Superintendent, Voyageurs National Park,	*	
Appellants,	*	

JUDGMENT

Appellant's motion to dismiss the appeal is granted. The appeal is hereby dismissed in accordance with the Federal Rules of Appellate Procedure 42(b).

The Court's mandate shall issue forthwith.

April 24, 1996

Order Entered Under Rule 27B(a):

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
5-94-CV-8

Jeffrey Mausolf; William Kullberg; Arlys Strehlo; and Minnesota United Snowmobilers Association	)	
v.	)	ORDER
Bruce Babbitt, Secretary, Department of Interior; Roger Kennedy, Director, National Park Service; Mollie Beattie, Director, U.S. Fish and Wildlife Service; and Ben Clary, Superintendent, Voyageurs National Park	)	

In December, 1992, the National Park Service ("NPS" or "Park Service") closed certain lakeshore areas in Voyageurs National Park ("Voyageurs" or "Park") to snowmobiles and motor vehicles. The closed areas are home to gray wolves and bald eagles, each of which is protected under the Endangered Species Act ("ESA" or "Act").[1] The Park Service's closure was imposed without notice or public consideration, ostensibly to prevent the possible taking of individual wolves and bald eagles and to protect the species population and habitat.[2]

[1] The parties do not dispute the validity of the lakeshore closures during the bald eagles' breeding period. See infra.

[2] All parties agree the Park's populations of gray wolves and bald eagles are stable. The parties also agree, however, that the Park's bald

Plaintiffs are snowmobilers who claim the lakeshore closures violated the ESA and the Administrative Procedure Act ("APA"). They seek declaratory and injunctive relief. Defendants, in turn, deny that plaintiffs have standing to make their claim; assert the closures were neither arbitrary nor capricious; and deny the NPS was required to initiate or participate in any rulemaking procedures before closing the areas to snowmobiles. Each party has submitted briefs and argued before the Court seeking summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). The parties agree there are no disputed facts and this case raises purely legal issues that can be resolved on these motions.

I. Background

A. The Endangered Species Act

In 1973, Congress enacted the Endangered Species Act, 16 U.S.C. § 1531 et seq., to protect America's endangered and threatened wildlife. Section 9 of the Act makes it unlawful for any person to "take" any species listed as endangered or threatened. 16 U.S.C. § 1538(1)(B)-(D). "Take" is statutorily defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Federal regulations define "harassment" as any act "which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." 50 C.F.R. § 17.3. The regulations define "harm" as "an act which actually kills or injures wildlife," and provide that "[s]uch act

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eagle population is reproducing at lower rates than bald eagle populations in surrounding areas. See infra.

may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." Id.

Section 7 of the ESA prohibits federal agencies from taking any action "likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary [of the Interior] . . . to be critical." 16 U.S. C. § 1536(a)(2). Federal agencies must formally consult the United States Fish and Wildlife Service ("FSW" or "Fish and Wildlife") concerning any prospective agency action that may affect listed species or their critical habitat. 16 U.S.C. § 1536(a)(3). After consultation, the FWS issues a biological opinion and determines whether the particular action is likely to jeopardize a species or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(3)(A). Federal regulations require that the biological opinion be formulated using "the best scientific and commercial data available." 50 C.F.R. § 402.14(g)(8).

At section 10, the ESA authorizes the Secretary of the Interior ("Secretary") to issue permits allowing any taking, which section 9 would otherwise prohibit, "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B). To issue such a permit, the FWS must provide an "incidental take" statement specifying the take's impact on the species and identifying "those reasonable and prudent measures . . . necessary or appropriate to minimize such impact." 16 U.S.C. § 1536(b)(4).

B. Voyageurs National Park

Congress authorized the creation of Voyageurs National Park in 1971 and established it in 1975. Pub. L. No. 91-661.

The Park is a northern Minnesota forest area, adjacent to the Canadian border. Glaciers have shaped its land to produce a system of internal waterways. The Park covers nearly 220,000 acres, of which 85,506 (39 percent) are water. The Kabetogama Peninsula accounts for almost half of the Park's land area.

Prior to the Park's establishment, its land was freely logged, mined, and used for recreation. In establishing the Park, Congress sought "to preserve for the inspiration and enjoyment of present and future generations, the outstanding scenery, geological conditions, and waterway system which constituted a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States." 16 U.S.C. § 160.

C. Bald Eagles

The bald eagle is classified under the ESA as a threatened species in Minnesota. Between 13 and 21 breeding eagle pairs have occupied Voyageurs since annual surveys began in 1973. U.S. Fish & Wildlife Service, Administrative Record for the Voyageurs National Park Wilderness Plan Consultation, Tab 13, at 8 [hereinafter Admin. Rec.]. Although the Park's bald eagle population is presently stable, its reproductive success has been below replacement. The Park's eagles reproduce at lower rates than do eagles in the adjacent Superior and Chippewa National Forests. Admin, Rec., Tab 46.

The causes of these low reproductive rates are unknown. Many theories have been posited, but none is recognized as the "cause" by wildlife experts. Among the possibilities is human disturbance during the breeding cycle, which may cause eagles to metabolize fat reserves containing polychlorobiphenyl ("PCB") and mercury. According to this

theory, such metabolism increases contaminant levels in eagle eggs.[3] Id., Tab 46, at 12.

Bald eagles return to Voyageurs in late February. Upon their arrival, eagles scavenge on fish and wolf kill remains until the ice melt in late April or early May. Under the PCB metabolism theory, the critical disturbance period for bald eagles extends from courtship in late February through incubation in mid-May. Id., Tab 29, at 14-15. As a result, the plaintiffs do not dispute the validity of temporary closures of trails within a quarter mile of bald eagle nests during the eagles' breeding season, but do challenge the validity of permanent closures of such trails outside the breeding period.

D. Gray Wolves

The gray wolf is also classified as threatened in Minnesota. Northeastern Minnesota contains one of the United States' most significant gray wolf populations. The best estimates count between 1,200 and 1,400 wolves in Minnesota. Wildlife experts recognize that the gray wolf's numbers are slowly increasing and their range is expanding. Id., Tab 29, at 16. Voyageurs maintains an average population of 35 individual wolves with an annual survival rate of 85 percent. These wolves comprise between 6 and 9 wolf packs, with 2 to 11 wolves per pack. Only half of Voyageurs' identified packs have territories completely within the Park.

Frozen surfaces of major lakes are important hunting areas for Voyageurs wolves. This is especially true during light-snow winters; during periods of heavy snow, wolves make most kills in wooded areas. Id., Tab 15. It is recognized that snowmobiles can cause temporary dispersal of

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[3] Other possible factors include decreased fishery productivity and environmental contamination, such as toxic chemicals in the food chain. Admin. Rec., Tab 46, at 12.

wolves. As a result, the Park Service has groomed and marked trails on lake surfaces to channel snowmobilers away from the shoreline, thereby preventing disruption of wolves feeding on kills. Id., Tab 19, at 11. Beyond this temporary dispersal, snowmobiles seem to pose no other threat to wolves.

An estimated 80 percent of wolf mortality within Minnesota is caused by humans. This includes animals shot, hit by cars, or snared and killed by trappers. Wolf packs having territories extending outside the Park, and wolves that venture beyond its borders, are especially vulnerable to human-caused mortality.[4] Id., Tab 29, at 16. Wolves within the Park, which have adapted their behavior to human recreational activities such as snowmobiling, cross-country skiing, ice fishing, and motor vehicle use, are not as vulnerable to human-caused mortality as those beyond the Park's borders.

E. Snowmobiles and Voyageurs National Park

The Voyageurs National Park Act recognized the land's historic recreational use by providing that "[t]he Secretary may, when planning development of the park, include appropriate provisions for (1) winter sports, including the use of snowmobiles." 16 U.S.C. § 160h. This express authorization of snowmobiling in Voyageurs is unique to the Park's enabling legislation.[5] Partly based on this authority, snowmobile use remained unregulated until well after the Park

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[4] Wolves venturing across the border into Ontario, Canada, may be taken legally.

[5] By contrast, the Boundary Waters Canoe Area Wilderness Act of 1978, which established Voyageurs's sister park, expressly prohibits the use of "motor vehicles, motorized equipment . . . [or any] other form of mechanical transport" in the Boundary Waters Canoe Area. 16 U.S.C. § 1132(c).

was established, pending assessment of snowmobiling's effect on wildlife.

1. 1991 Regulations

The NPS issued its first Voyageurs snowmobiling regulations in January, 1991. See 36 C.F.R. § 7.33(b) (1991). These regulations expressly allowed snowmobiling on virtually all of the Park's frozen lake surfaces. Id. They also authorized the Park Superintendent to temporarily close trails or lake surfaces, after "taking into consideration public safety, wildlife management, weather, and park management objectives." Id. § 7.33(b)(3).

The Park Service promulgated the 1991 regulations after determining that snowmobiling was generally insignificant in its impact on wildlife. This determination was based on a series of NPS and FWS investigations and reports. In its 1989 draft trail plan, for example, the NPS found that "[p]ersons on foot (hikers, skiers, or snowshoers) seem to have greater effects than snowmobilers do by causing animals to run sooner and farther than they run from snowmobiles." See id., Tab 13, at 16. The NPS made similar findings in its 1990 environmental assessment, which evaluated the potential impact of lake surface snowmobiling. Id., Tab 29. The 1990 assessment anticipated that passing snowmobiles or other winter recreationists would sometimes displace wolves feeding on deer carcasses along shorelines. The report then determined that, because wolves normally hunt and devour their kills in the evenings and early mornings, and because they spend relatively short periods of time on a kill, there was little chance for long-term displacement. The NPS assessment noted,

> Although the frequency of displacement by winter recreationists and return of wolves to prey have not been formally studied at Voyageurs, if winter

> recreationists have a significant detrimental effect on the park's wolf population, it has not been reflected in the relative stability of the population during the first 15 years of the park's existence.

Id., Tab 29, at 10.

The Fish and Wildlife Service made similar findings in its April, 1989, biological opinion. The opinion stated that the NPS's proposed snowmobile trail across the Kabetogama Peninsula would not jeopardize the continued existence of the gray wolf in Minnesota or adversely modify its critical habitat.[6] Id., Tab 19, at 12. The 1989 opinion added that restricting snowmobiles to established trails could benefit wolves. Nevertheless, Fish and Wildlife concluded that "no incidental take is anticipated to result from the [NPS's] proposed action and none is authorized." Id., Tab 19, at 13. In June, 1990, the FWS reiterated its 1989 opinion and extended its application to snowmobile trails traversing lake surfaces. The FWS concluded that lake surface snowmobiling would not adversely affect the gray wolf or bald eagle beyond the impacts indicated in its 1989 opinion.[7] Id., Tab 26.

As it developed Voyageurs' snowmobiling regulations, the NPS also consulted with Dr. David Mech and other renowned wildlife biologists. Dr. Mech stated,

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[6] The FWS noted its findings would need to be reassessed based on the first formal NPS report on gray wolf research. The research was to be completed by September, 1991, with a final report due in 1992. No such report appears in the administrative record.

[7] The FWS recognized that this-finding was also subject to change based on gray wolf research and proposed research concerning the cumulative impacts of snowmobiles and other human-caused disturbances. The FWS stated, "While we share the general belief that such [cumulative] impacts may be insignificant, such opinions are primarily based on a loose collection of expert observation."

> I know of no evidence, or reason to believe, that snowmobiling . . . or other winter sports will have a detrimental effect on the survival of [the Voyageurs] wolf population. Wolves' avoidance of well used human trails should cause them no real inconvenience nor should it interfere with their hunting.

Id., Tab 7.

2. The Fish and Wildlife Service's 1992 Biological Opinion

In August, 1991, the NPS completed a draft wilderness plan recommendation and revised environmental impact statement for Voyageurs. The wilderness plan proposed continued motorized access to the major lake surfaces, 16 miles of snowmobile portages, and all lake surfaces connected by the Chain of Lakes trail. The plan also contemplated reduced snowmobile use on onland trails. This diminution was to be accomplished by limiting onland snowmobiling to a 12-foot wide track on the Kabetogama Peninsula. The NPS made this recommendation after concluding that snowmobiling on onland trails might adversely impact the gray wolf population. After issuing its wilderness plan, the Park Service requested a biological opinion from the FWS.

In preparing its biological opinion, Fish and Wildlife asked the Park Service for evidence of any harassment or taking of gray wolves within the park. Id., Tab 44. The NPS responded that it had little evidence of harassment or takings. Id., Tab 45, at 8. Concerning harassment, the Park Service reported "casual observations" suggesting that snowmobilers disturbed wolves feeding on kills along the shorelines of major lakes. The NPS received reports indicating that some snowmobilers may have removed choice cuts of meat from

wolf-killed deer. The NPS concluded, however, that "[t]he extent to which a given wolf pack is disturbed and, once disturbed, abandons a kill is unknown."

The NPS reported two apparent aerial gunnings of wolves at Namakan Lake. The shootings occurred in December, 1986, and March, 1988. It was unclear whether either shooting occurred within the Park. The Court notes that the NPS could not substantiate any other rumors of wolves being killed illegally in the Park, but acknowledged that many wolves were illegally killed beyond its borders.[8]

In March, 1992, the FWS issued a biological opinion concluding that the proposed wilderness plan would not jeopardize the continued existence of the bald eagle or gray wolf in Minnesota or adversely affect the wolves, critical habitat. Id., Tab 46. Notwithstanding this lack of empirical evidence or competent expert evidence to support it, Fish and Wildlife expressed concern over allowing snowmobiling across the Kabetogama Peninsula and on the major lakes. The FWS acknowledged that snowmobiler disruption of wolves hunting prey seemed insignificant on a case-by-case basis, but hypothesized that "repeated disruptions may lead to a cumulatively significant effect, particularly during periods of stress caused by severe weather or reduced prey availability." The FWS concluded with the unsurprising statement that "[i]nformation provided . . . [by] the National Park Service points directly to the need for a better understanding of the impact of human disturbance on the gray wolf population in Voyageurs National Park."

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[8] Human-caused mortality was significant on radio-collared animals venturing outside the Park between 1987 and 1989. Of 18 wolves fitted with radio collars in the fall of 1987, five were illegally killed outside of the Park within 18 months. In addition, two radio collars were recovered under circumstances suggesting the wolves wearing them had been killed. Admin. Rec., Tab 64, at 4.

Fish and Wildlife issued an incidental take statement along with its biological opinion. Id., Tab 46. Based on the survival rate of wolves and reports of takings, the FWS decided that no more than six individual wolves could be taken incidental to the management of the Park.

In March, 1992, Fish and Wildlife directed the Park Service to implement trail closures consistent with its biological opinion and the incidental take statement. In a memo sent to NPS's midwest regional director in May, 1992, Voyageurs Park Superintendent Ben Clary expressed his disagreement with the opinion and the recommended closures. He stated, "The leading wildlife biologist[s], including the USFWS biologist, have once again stated that snowmobiling will not have [a] significant impact on the gray wolf. For this reason, we should question the opinion." Id., Tab 49, at 4. Clary's memo concluded, however, that the "legal ramifications of the opinion" left him no choice but to implement the closures. On December 16, 1992, Clary issued an order closing 16 of the Park's lake bays and certain shoreline areas to motorized access during the winter.[9] Id., Tab 53. The order was issued pursuant to 36 C.F.R. § 7.33(b)(3), which authorizes temporary closure of lake surfaces to achieve wildlife management objectives. No notice was published in the Federal Register and no comment period was

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[9] The restricted use areas are dispersed throughout the Park and total 6,541 acres or 7 percent of the Park's total water acreage and 3 percent of the total park acreage. The closures cover the entire northwest quadrant of Kabetogama Lake, as well as some smaller lakes and embayments of larger lakes in the park: (1) Rainy Lake -- Cranberry Bay, Marion Bay, Browns Bay, southwest half of Saginaw Bay and an unnamed bay located immediately west of Laurins Bay; (2) Namakan Lake -- Hammer Bay and Junction Bay; (3) Sand Point Lake -- Swansons Bay, Brown Bay and an unnamed bay off the south of Grassy Bay; (4) Kabetogama Lake -- eastern half of Sullivan Bay, Lost Lake, Blind Ash Bay, the Lost Lake-Long Slu-Elks Bay complex, Daley Bay and Tom Cod Bay.

allowed. The closures continued as the order was renewed in 1993 and 1994. Admin. Rec., Tabs 57 and 59.

3. 1994 Supplement to the 1992 Biological Opinion

The 1992 closures drew numerous objections, primarily from potential Park visitors who could no longer enjoy some of Voyageurs' finest scenery and natural experiences. Plaintiffs in this action filed a notice of intent to sue in the fall of 1993, and filed their complaint on January 1, 1994.

Upon receiving plaintiffs' notice of intent to sue, the FWS supplemented its 1992 biological opinion, ostensibly to clarify its position. This supplement, issued February 16, 1994, stated that the lakeshore closures were designed to minimize the harm, harassment, and taking of gray wolves. Id., Tab 64. The FWS explained that although snowmobiles themselves do not impact the gray wolf, the vehicles provide access for individuals who would harm the species. Thus, by selecting areas for closure known to be of greater habitat value to the gray wolf and their prey, it was the FWS's expressed intent to reduce the opportunity for adverse human/wolf contact.

The FWS characterized wolf harassment as "infrequent" but "not an unheard of event." Id., Tab 64, at 5. The FWS listed four to five records of "incidents that constitute take by the harassment or harming of gray wolves."[10] Id., Tab 64, at 6. The FWS also cited "numerous additional reports of harassment of gray wolves, . . . most of which are anecdotal and not well documented." Fish and Wildlife acknowledged that "without documentation, there is little or no evidence that

[10] Evidence of takings of gray wolves includes deer carcass studies conducted by park personnel. Of 43 deer carcasses examined by park personnel in 1988 and 1989, two were found with evidence of human scavenging, indicating wolves had been driven off their kills. Many other deer carcasses consisted of remains that would leave no evidence of human scavenging. Admin. Rec., Tab 64, at 4-5.

these incidents have resulted in a taking as defined by the ESA and its regulations."

In its 1994 supplement, the FWS also revised its incidental take statement. The FWS stated that the incidental take statement accompanying the 1992 biological opinion did not differentiate between wolves harmed by natural causes and wolves harmed by takings. Accordingly, in its 1994 supplement, the FWS estimated that roughly one incident of gray wolf taking occurred annually. Based upon these materials and this evidence, the FWS reduced the permissible number of incidental takings from 6 to 2 wolves per year. Id., Tab 64, at 6.

II. Discussion

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 246 (1986). In the present case, all parties agree there is no material fact in dispute, leaving their cross-motions for summary judgment ripe for decision.

A. Standing

Plaintiffs must meet the requirements of Article III standing to bring suit under the ESA. Defenders of wildlife v. Hodel, 851 F.2d 1035, 1039 (8th Cir. 1988);[11] see also 16

[11] Accord Babbitt v. Sweet Home Chapter of Communities for a Great Or.,115 S. Ct. 2407 (1995) (plaintiffs with an economic interest in the forest products industry brought action under the ESA challenging regulations promulgated by Secretary of Interior). But see Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995) (applying "zone of interest" test of prudential standing to plaintiffs bringing suit under the ESA).

U.S.C. § 1540(g) (stating that "any person" may commence a suit to enjoin any person or government entity alleged to have violated the ESA). Contrary to defendants' suggestion, the Court does not find this to be an onerous burden. To establish Article III standing, plaintiffs must show that (1) they have suffered an injury in fact, (2) the injury can fairly be traced to the conduct complained of, and (3) the injury is likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555. 560-61 (1992) (citations omitted).

Plaintiffs Jeffrey Mausolf, William Kullberg, and Arlys Strehlo are members of the Minnesota United Snowmobilers Association.[12] Their affidavits establish that they have used and wish to continue using the Park's now-restricted areas for snowmobiling and wildlife observation. Plaintiffs claim they have been harmed by the closures because they are prevented from observing wolves in their natural habitat. Plaintiffs also contend they have been injured because the closures were imposed without a proper basis under the ESA. They assert that the FWS has gone beyond the authority of the ESA by imposing unnecessary and insupportable restrictions.

Based upon these unchallenged assertions, the Court finds that plaintiffs, as individuals, meet the constitutional requirements for standing: they allege injuries in fact; the injuries are concrete, particularized, and immediate; the lakeshore closures imposed by defendants have caused these injuries; and the injuries can be redressed by the relief they seek. The plaintiffs have standing to bring suit under the ESA.

Defendants offer a second line of defense: they assert that although plaintiffs may satisfy constitutional standing requirements, they lack standing under the Administrative Procedures Act. Defendants contend that plaintiffs, concerns

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[12] It appears to be unchallenged that the interests alleged by plaintiffs are sufficiently related to the purposes of the Minnesota United Snowmobilers Association such that the association has standing if any of its members do.

fall outside the "zone of interests" protected by the Endangered Species Act because, according to defendants, plaintiffs' interest is in recreational snowmobiling and the ESA's interest is species protection. Based on this dichotomy, defendants deny plaintiffs can bring an APA claim.

The APA provides that persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute" may bring suit to challenge a final agency action. 5 U.S.C. § 702. Accordingly, under the APA, plaintiffs must show the challenged agency action resulted in injury to an interest arguably within the "zone of interests" protected by the statute at issue. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 893 (1990); Sierra Club v. Morton, 405 U.S. 727, 733 (1972).

The prudential "zone of interests" test is to be broadly construed and is not especially demanding. Clarke v. Security Industry Ass'n, 479 U.S. 388 (1987). "The essential inquiry is whether Congress 'intended for a particular class of plaintiffs to be relied on to challenge the agency disregard of the law.'" Id. at 399 (quoting Block v. Community Nutrition Inst., 467 U.S. 340, 347 (1984)). There need only be a "plausible relationship" between the interests of the plaintiffs and the policies embodied in "the overall context" of the statute at issue. Id. at 401-02.

In the present case, defendants argue plaintiffs, interests fall beyond those meant to be protected under the ESA. Defendants claim plaintiffs, true interest is in unlimited motorized access to the Park -- they suggest plaintiffs have concocted their "concern" about decreases in wildlife observation solely to invoke federal jurisdiction. Defendants assert further that even if plaintiffs sincerely desire an opportunity to observe wildlife in the Park's restricted areas, they still lack standing because plaintiffs' claim does not flow from a risk of harm to wolves or bald eagles.

The Court rejects defendants' arguments. Certainly, in most environmental cases, plaintiffs' asserted interest is directly aligned with the listed species, interests, i.e., the plaintiff claims injury because the challenged agency conduct threatens to diminish or deplete the numbers of endangered animals available for observation. See. e.g., Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (claiming construction of Tellico Dam would injure endangered snail darter); Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976) (claiming construction of Meramec Park reservoir would jeopardize endangered Indiana bat). The Court finds, however, that interests other than those asserted on behalf of endangered species also fall within the zone of interests protected by the ESA.

Standing "is not a concept that can be defined by strict metes and bounds and is not susceptible to facile application." Banks v. Secretary of Ind. Family & Social Servs. Admin., 997 F.2d 231, 238 (7th Cir. 1993). Although plaintiffs' immediate concern may not be protection of wolves or their habitat, the desire to observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purposes of standing. Lujan v. Defenders of Wildlife, 504 U.S. at 562-63 (citing Sierra Club v. Morton, 405 U.S. at 734). The Court finds that plaintiffs have expressed an interest within the ambit of the ESA.

Defendants contend, however, that plaintiffs' stated harm is not cognizable under the ESA and APA. The Court notes with interest that counsel for defendants could not identify a single potential plaintiff who would have standing to complain if the government took steps to "overprotect" listed species.[13]

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[13] The government, during oral argument, expressed the view that there is absolutely no judicial recourse for persons who contend the FWS acts overzealously on behalf of listed species. In response to a hypothetical posed by the Court, defendants asserted that the FWS could close the entire park to human access to minimize the possibility of any

The Court is unwilling to adopt the view that the FWS is unrestrained if it cloaks any of its acts in the laudable robe of endangered and threatened species protection. This is a form of totalitarian virtue -- a concept for which no precedent has been advanced and which is foreign to the rule of law. It is, instead, the Court's view that the FWS must operate within the parameters of the ESA. See. e.g., Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. at 2421 (O'Connor, J., concurring) (discussing regulations promulgated pursuant to the ESA and stating that "[o]ne can doubtless imagine questionable applications of the regulation that test the limits of the agency's authority").[14] Defendants question plaintiffs' true interest in challenging the lakeshore closures, but do not suggest that plaintiffs lack any concern for wolf protection in the Park. Thus, plaintiffs, interests are congruent with the purposes of the ESA because plaintiffs, too, are ultimately served by a thriving wolf population in Voyageurs Park.

B. Authority Under the ESA to Implement the Closures

The Court recognizes its obligation to accord agency determinations great deference. A court may overturn agency

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incidental takes of protected species. Defendants took the remarkable position that such an action would be immune from challenge, and entirely beyond review, because it benefits, rather than harms, endangered or threatened species. The government maintained this position, even recognizing the extremely conjectural risk of incidental taking in this case.

[14] Adopting defendants' position would restrain challenge and judicial review of species-protective measures to an agency's "upstream," as opposed to "downstream," action. That is, any agency action declared protective of a species would, ab initio, be immune from review. A court could only consider an agency action that was deemed inimical to a species' survival.

actions only if they are "arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837, 842-44 (1984); see also Froehlke, 534 F.2d at 1301 (stating that agency action under the ESA is subject to the "arbitrary and capricious" standard of review). When an agency determination involves construction of an administrative regulation, rather than a statute, deference "is even more clearly in order." Udall v. Tallman, 380 U.S. 1, 16 (1965). If an agency's determination is supportable on any rational basis, a court must uphold it. Production Credit Ass'n v. Farm Credit Admin., 783 F. Supp. 416, 417 (D. Minn. 1991); see also Bowman Trans., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281 (1974) (stating that courts must not attempt to "substitute their judgment for that of the agency").

Even under such a deferential standard of review, an unsupported agency decision is not sacrosanct. An action is considered arbitrary and capricious if the agency's explanation in support "runs counter to the evidence before the agency." Defenders of Wildlife v. Administrator, Envtl. Protection Agency, 688 F. Supp. 1334, 1348 (D. Minn. 1988) (Murphy, J.), aff'd in part, rev'd in part on other grounds, 882 F.2d 1294 (8th Cir. 1989).

Plaintiffs contend the lakeshore closures were arbitrary and capricious because: (1) the NPS and the FWS did not adequately explain the action; (2) the NPS and the FWS relied on anecdotal evidence in ordering the closures; and (3) the NPS and the FWS failed to consider important issues surrounding the closures. Defendants reply that the closures are "exceedingly reasonable" and based on the best available evidence.

The Court agrees with plaintiffs that defendants failed to explain adequately the reasons for the closures. Because the Court finds the government's explanation inadequate, the Court must remand the matter to the FWS and the NPS to

allow them to supplement the administrative record. See Federal Power Comm'n v. Transcontinental Gas Pine Line Corp., 423 U.S. 326, 331 (1976). In finding the government's explanation for the closures inadequate, the Court rejects plaintiffs' flat assertion that defendants may not rely on anecdotal evidence. Plaintiffs argue, in effect, that anecdotal evidence can never constitute scientific evidence sufficient to support ESA actions. Plaintiffs cite no cases in support of this proposition, and the Court declines to hold that anecdotal evidence can never be a basis for an ESA action. There remains, however, a deep concern whether wholly anecdotal evidence can constitute the "best scientific and commercial data available," required under the ESA.

A generous review of defendants' evidence reveals: Snowmobilers and other winter recreationists have apparently displaced some wolves feeding on kills along shorelines, but scientific evidence shows the likelihood of permanent displacement is less than minimal. Of the four validated reports of wolf takings, two were aerial gunnings, bearing no relation to snowmobile trail closures. One poacher drove a wolf off a kill and scavenged the remains, with neither evidence nor suggestion that a snowmobile was present. Finally, one snowmobiler apparently permanently displaced a wolf feeding on a kill. The only formal, scientifically prepared reports indicate that snowmobilers have no significant impact on wolf or eagle populations, although "generally accepted" principles indicate that increased Park access, by whatever means, will likely result in increased mortality among individual animals.

Upon reviewing this evidence, the Court finds it does not support the decision to limit snowmobiling, an activity that has gone on for many years within Voyageurs. The Court shares defendants' concern for any reported takings of Voyageurs wolves, but finds that the evidence presently in the record is inadequate to establish that curtailing snowmobiling will

improve the condition of this stable population. See Defenders of Wildlife, 688 F. Supp. at 1348.

The Court finds the agency's conclusion that these lakeshore closures are reasonably necessary to prevent incidental takings of Voyageurs wolves and bald eagles is based on little more than speculation. In the end, the FWS and the NPS simply contend that temporary displacements of these species may evolve into permanent displacements if snowmobilers are allowed continued access to lakeshore trails. There is absolutely no evidence in the record to support this proposition. Indeed, the only record evidence is to the contrary: both the FWS and the NPS have reported that temporary dispersal rarely results in permanent displacement from a kill. Admin. Rec., Tabs 19, 26, and 29. See Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. at 2420 (O'Connor, J., concurring) (discussing the definition of "harm" under the ESA and stating that "the regulation clearly rejects speculative or conjectural effects").

Defendants finally cling to the argument that the lakeshore closures are reasonable because of the "generally accepted" principle that increased access to wildlife will result in increased mortality. This argument, too, falls short. This "generally accepted" principle applies equally to any mode of transportation -- snowmobiles, motor vehicles, skis, snowshoes, hiking, or aircraft. The value, if any, of a snowmobile bar on the basis of such evidence is purely speculative. See id. (O'Connor, J., concurring) (stating that speculation will not support agency actions under the ESA); Greenpeace Action v. Franklin, 14 F.3d 1324, 1337 (9th Cir. 1992) (upholding measures promulgated under the ESA "premised . . . on a reasonable evaluation of available data, not on pure speculation").

The danger of premising lakeshore closures on "generally accepted principles," rather than on particularized evidence, is apparent. Facile resort to the precept that "increased access

leads to increased mortality," if taken to its logical extreme, would allow the FWS and the NPS to close Voyageurs altogether. This was not Congress's intent when it established Voyageurs.

III. Conclusion

Having found that the government's explanation for the lakeshore closures is presently inadequate, the Court remands this matter to the FWS and the NPS to supplement the administrative record. See Federal Power Comm'n, 423 U.S. at 331. Pending a sufficient explanation for the closures, the Court enjoins their enforcement, pursuant to 16 U.S.C. § 1540(g)(1)(A).[15]

Accordingly, IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment is granted.
2. Defendants' motion for summary judgment is denied.
3. This matter is remanded to the FWS and the NPS for further evidentiary findings consistent with this opinion. Pending further explanation from these agencies, defendants are enjoined from enforcing the lakeshore closures.

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[15] The Court's determination that the lakeshore closures are, at present, invalid does not extend, of course, to the closure of trails surrounding eagles, nests during the eagles' breeding season. As already noted, the parties have stipulated that such closures are valid.

Because the Court determines the lakeshore closures, beyond the eagles, breeding season, are invalid under the ESA, it need not address at this time plaintiffs' argument that the closures violate the APA.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 23rd, 1996

/s/
JAMES M. ROSENBAUM
United States District Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 95-1201MN

Jeffrey Mausolf; William Kullberg; Arlys Strehlo; and Minnesota United Snowmobilers Association,	*	
Appellees,	*	
v.	*	
Bruce Babbitt, Secretary, Department of the Interior; Roger Kennedy, Director, National Park Service; Mollie Beattie, Director, U.S. Fish and Wildlife Service; Ben Clary, Superintendent, Voyageurs National Park,	*	On Appeal from the United States District Court for the District of Minnesota.
Appellees.	*	
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Voyageurs Region National Park Association; Sierra Club, North Star Chapter; Humane Society of the United States; Friends of the Boundary Waters Wilderness; National Park and Conservation Association; and Izaak Walton;	*	

League of America, *
*
Appellants. *

Submitted: October 20, 1995
Filed: June 3, 1996

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

The plaintiffs -- three snowmobile enthusiasts and the Minnesota United Snowmobilers Association (collectively, "the Snowmobilers") -- sued the Secretary of the Interior and other defendants ("the Government"), seeking to enjoin the enforcement of restrictions on snowmobiling in Voyageurs National Park. The Voyageurs Region National Park Association and other conservation groups (collectively, "the Association") moved to intervene under Fed. R. Civ. P. 24. The Association claimed an interest in the vigorous enforcement of the restrictions and expressed concern that the Government might settle with the Snowmobilers or back away from the rules. The District Court denied the motion, concluding that the Government adequately represented the Association's interests. Mausolf v. Babbitt ("Mausolf I"), 158 F.R.D. 143 (D. Minn. 1994) (opinion of Magistrate Judge), approved, Order of November 15, 1994 (order of District Judge). We reverse.

During the pendency of this appeal, the District Court granted the Snowmobilers' motion for summary judgment, and held that the Government's explanation for the restrictions was inadequate under the Endangered Species Act. The Court

remanded the case to the Fish and Wildlife Service and the Park Service to supplement the administrative record, and enjoined enforcement of the restrictions on snowmobiling, "[p]ending a sufficient explanation . . .." Mausolf v. Babbitt ("Mausolf II"), 913 F. Supp. 1334, 1344 (D. Minn. 1996). We think, however, that the question of intervention is not moot, because the Association has appealed this judgment. Jeffrey Mausolf v. Voyageurs Region National Park Ass'n, No. 96-1856 (8th Cir., notice of appeal filed March 25, 1996).

I.

Voyageurs National Park is a watery maze of over 30 lakes and 900 islands along the border between northern Minnesota and Canada. The Park's name pays tribute to the fur traders and explorers who travelled by canoe from Montreal deep into northwestern Canada.[1] The Park's four largest lakes -- Rainy, Kabetogama, Namakan, and Sand Point -- surround the Kabetogama Peninsula (about one-half the Park's land area) and are themselves linked by smaller lakes, rivers, and bogs. Most of the Park is quite remote, and accessible only by water. Voyageurs is renowned for its fishing and boating, and visitors often see bald eagles and grey wolves in the wild. Voyageurs has also long been a popular destination for snowmobilers, who have, over the years, used both the Park's frozen lake surfaces and -- more controversially -- certain overland trails. This case is the latest

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[1] In 1971, Congress authorized the establishment of the Park

> . . . to preserve, for the inspiration and enjoyment of present and future generations, the outstanding scenery, geological conditions, and waterway system which constituted a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States.

Voyageurs National Park Act, 16 U.S.C. § 160 et seq.

in a series of disputes over the use and management of the Park.[2]

Some background information will make this case easier to understand. In 1991, after several years of study, the National Park Service issued final regulations, based on a series of environmental- and wildlife-impact reports, allowing snowmobiling on practically all the Park's lake surfaces and also on certain trails and portage routes. See 36 C.F.R. § 7.33(b) (1991).[3] The Association then sued, claiming that the regulations, and the Department of the Interior's failure to submit a "wilderness recommendation" for the Park to the President, were illegal.[4] The District Court ordered the Secretary of the Interior to make a "wilderness recommendation" within a year, but refused to enjoin snowmobiling in the Park's Kabetogama Peninsula. See VRNPA, 1991 WL 343370 at *11-14.

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[2] For more on the litigation surrounding the Park, see, e.g., Voyageurs Region National Park Association v. Lujan ("VRNPA"), 1991 WL 1143370 (D. Minn., April 15, 1991), aff'd, 966 F.2d 424 (8th Cir. 1992).

[3] The Voyageurs National Park Act, recognizing the Park's longstanding appeal to snowmobilers, provided that "[t]he Secretary may, when planning development of the park, include appropriate provisions for (1) winter sports, including the use of snowmobiles, ..." 16 U.S.C. § 160h. After the Park was established, snowmobiling continued relatively unregulated, pending the results of wildlife-impact studies. See Mausolf II, 913 F. Supp. at 1338.

[4] The Association argued that the Voyageurs National Park Act, 16 U.S.C. § 160 et seq., and the Wilderness Act of 1964, 16 U.S.C. § 1131 et seq., required the Secretary of the Interior to submit a "wilderness recommendation" for the Park to the President within four years of the Park's establishment, and that the Secretary had not complied with this requirement. VRNPA, 1991 WL 343370 at *1-2. The Association also contended that the Wilderness Act, the Voyageurs National Park Act, and Department of the Interior regulations, see 36 C.F.R. § 2.18(c), prohibited the Park from allowing widespread snowmobiling in potential wilderness areas. VRNP, 1991 WL 343370 at *1-3.

Accordingly, in August 1991, the National Park Service proposed a wilderness plan which would have significantly reduced overland snowmobiling, but allowed it on major lakes, a few designated portage trails, and the Chain of Lakes Trail. The Park Service then asked the Fish and Wildlife Service for its "biological opinion" about the effect, if any, snowmobiling could have on grey wolves, bald eagles, and other animals in the Park. In March 1992, Fish and Wildlife concluded that the Park Service's plan would not threaten animals' survival or habitats. Nonetheless, Fish and Wildlife directed the Park Service to close specified trails, lakeshores, and lakes to snowmobiles and other motor vehicles. So, in December 1992, Park officials issued an order, without giving notice or inviting interested parties to comment, closing 16 of the Park's lake bays and certain shoreline areas to winter motorized access. See 36 C.F.R. § 7.33(b) (3) (1993) (authorizing temporary closure of lake surfaces for wildlife-management purposes). This order, which was renewed in 1993 and 1994, dramatically reduced the area available for snowmobiling.

These new regulations angered many past and potential Park visitors, including the Snowmobilers, who could no longer enjoy some of the Park's more beautiful and remote areas. The Snowmobilers sued the Government in January 1994, claiming that Fish and Wildlife's biological opinion did not support closing so much of the Park, and that the regulations were therefore arbitrary and capricious. According to the Snowmobilers, not only had the Government turned an abrupt and unexplained "about face," it had also failed to consider the best available scientific and commercial information before imposing the new restrictions. See Mausolf II, 913 F. Supp. at 1335-36; Mausolf I, 158 F.R.D. at 144-45. The Association then moved to intervene so it could vindicate its interest in restricting snowmobiling in the Park and in making sure the new regulations were strictly enforced. The Association contended that for years the Government

illegally -- and over the Association's objections -- permitted unrestricted snowmobiling in the Park and refused to implement proper wilderness-protection measures. The Association asserts that the Government cannot be trusted to protect the Association's interests because of its alleged history of siding with the Snowmobilers. See Mausolf I, 158 F.R.D. at 147.

The District Court conceded that the Association had a recognized interest which might be impaired by the disposition of the case. The Court noted, however, that, under the parens patriae doctrine, government entities are presumed to represent the interests of all their citizens. Would-be intervenors can rebut this "presumption of adequate representation" only by identifying their "local and individual interests not shared by the general citizenry." Mausolf I, 158 F.R.D. at 147-48 (citing Mille Lacs Band of Chippewa Indians v. Minnesota, 989 F.2d 994, 1001 (8th Cir. 1993)). The District Court was not persuaded that the Government would unduly subordinate the Association's interests to more general, national interests, and, therefore, denied intervention as of right under Rule 24(a). The District Court also refused to exercise its discretion to allow permissive intervention under Rule 24(b), fearing that the Association might delay the case with additional discovery and further joinder of issues and parties. Mausolf I, 158 F.R.D. at 148. However, recognizing the potential benefits of the Association's collective knowledge and perspective, the Court allowed the Association to participate as amicus curiae and to file a memorandum addressing the parties' cross-motions for summary judgment. Ibid. The District Court confirmed the Magistrate Judge's order, and the Association appealed. We reverse.

II.

The Snowmobilers contend that the Association may not intervene as of right because it lacks Article III standing. The Magistrate Judge concluded, and the District Judge agreed, that "[t]he question of standing . . . is irrelevant to our determination of whether the Association may intervene as of right." Mausolf I, 158 F.R.D. at 146. The District Court said that even if the Association did not have standing to sue, it could still intervene under Rule 24(a) if it had a "recognized interest in the subject of the litigation." Id. at 146 n.4 (citing Mille Lacs, 989 F.2d at 997).

A.

Rule 24(a) says nothing about standing. To intervene as of right, an applicant must (1) have a recognized interest in the subject matter of the litigation that (2) might be impaired by the disposition of the case and that (3) will not be adequately protected by the existing parties. Mille Lacs, 989 F.2d at 997. As the District Court observed, the Supreme Court has not yet decided whether a would-be intervenor must have Article III standing. See Diamond v. Charles, 476 U.S. 54, 68-69 & n.21 (1986) (an intervenor may not appeal, or continue a suit, without the party on whose side intervention was permitted, unless intervenor has Article III standing).[5]

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[5] The Court observed that

> the precise relationship between the interest required to satisfy [Rule 24] and the interest required to confer standing . . . has led to anomalous decisions in the Courts of Appeals. We need not decide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.

476 U.S. at 68-69 (footnote omitted).

The courts of appeals have taken diverse, sometimes "anomalous," id. at 68, approaches. By way of illustration, at least one circuit has held that Article III standing is required to intervene, see, e.g., Building and Const. Trades Dept., AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994); another has stated that, while Article III standing is not required, it is "relevant" to identifying the "interest" required for intervention under Rule 24, see, e.g., Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989); others have concluded that standing is not required for intervention, see, e.g., United States Postal Service v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978); Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994); Yniquez v. State of Arizona, 939 F.2d 727, 731 (9th Cir. 1991); and still another has suggested that Rule 24 requires an interest even "greater than the interest sufficient to satisfy the standing requirement." See, e.g., United States v. 39.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985), cert. denied, 476 U.S. 1108 (1936). Our Court has not yet taken a firm position in this debate, although we have, in some cases, decided intervention issues without discussing Article III standing.[6]

The Association urges us to adopt the "majority view," and to hold that standing is not required for intervention. It contends that "[i]ntervention is not a means for beginning a lawsuit, but a mechanism that allows all parties with an interest to participate in an existing lawsuit." Because the lawsuit's original parties have created the "case" or

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[6] See, e.g., United States v. Union Elec. Co., 64 F.3d 1152, 1158-70 (8th Cir. 1995); Mille Lacs, 989 F.2d at 997; Sierra Club v. Robertson, 960 F.2d 83, 85 (8th Cir. 1992); County of St. Louis v. Thomas, 162 F.R.D. 583, 586 n.9 (D. Minn. 1995) ("[T]he Eighth Circuit resolves questions of intervention without reference to the standing doctrine."); but see United States v. Metropolitan St. Louis Sewer Dist., 883 F.2d 54, 56 (8th Cir. 1989) (noting that proposed intervenors' allegations were "sufficient to give [them] constitutional standing").

"controversy" required by Article III, the Association argues, there is no reason to require a would-be intervenor, who satisfies Rule 24(a)'s requirements, to have standing. In support, the Association points to the following language from Chiles, supra:

> The standing doctrine ensures that a justiciable case and controversy exists between the parties. Intervention under Rule 24 presumes that there is a justiciable case into which an individual wants to intervene. . . . [A] party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit.

Chiles, 865 F.2d at 1212-13.

We are not so sure as the Association that there is a "majority view" on this question--indeed, our survey of the cases reveals considerable diversity of views, not consensus. But even if the Association's position did represent the majority view, we would still disagree with it. We conclude that the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court.

B.

Our Constitution is a charter for limited government. Article III limits the "judicial power" to "cases" and "controversies." U.S. Const., art. III., § 2, cl. 1. From this "bedrock requirement," Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982), flow several doctrines -- e.g.,

standing, mootness, ripeness, and political question -- which "state fundamental limits on federal judicial power in our system of government." Allen v. Wright, 468 U.S. 737, 750 (1984). Article III's standing requirement is a restraint on the "judicial power" as unyielding as that placed on Congress by, for example, the First Amendment.

Rule 24(a) speaks to practical concerns by requiring that intervenors have a recognized interest in the subject matter of the litigation which might be impaired by the disposition of the case and which will not be adequately protected by the existing parties. See New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir.) (analogizing intervention requirements to prudential standing rules), cert. denied, 469 U.S. 1019 (1984). The Rule promotes the efficient and orderly use of judicial resources by allowing persons, who might otherwise have to bring a lawsuit on their own to protect their interests or vindicate their rights, to join an ongoing lawsuit instead. But, judicial economy and the Rules of Civil Procedure notwithstanding, Congress cannot circumvent Article III's limits on the judicial power. See Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1128 (1996) (it is "fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III"); Valley Forge, 454 U.S. at 471-75 (" . . . [N]either the counsels of prudence nor the policies implicit in the 'case or controversy' requirement should be mistaken for the rigorous Art. III requirements themselves."); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the Art. III minima . . .") (emphasis added). Congress could no more use Rule 24 to abrogate the Article III standing requirements than it could expand the Supreme Court's original jurisdiction by statute. See Marbury v. Madison, 1 Cranch 137 (1803).

The Association's position is that once an Article III case or controversy is underway, anybody who satisfies Rule 24's

requirements may then join in. As long as the original parties are involved, the Association insists, the lawsuit remains within the scope of the federal "judicial power." We disagree. In our view, an Article III case or controversy, once joined by intervenors who lack standing, is -- put bluntly -- no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well. The Supreme Court has made it very clear that "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." Valley Forge, 454 U.S. at 475-76; see also Allen, 468 U.S. at 750-51 ("In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.") (citation omitted). Because an intervenor seeks to become a "suitor," and asks the court to "decide the merits of the dispute," he must not only satisfy the requirements of Rule 24, he must also have Article III standing. See Building and Const. Trades, 40 F.3d at 1282 ("[B]ecause an intervenor participates on an equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as the original parties.").[7]

The standing requirement is, at its core, a constitutionally mandated prerequisite for federal jurisdiction, and "an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555,

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[7] See also City of Cleveland, Ohio v. NRC, 17 F.3d 1515, 1516-1517 (D.C. Cir. 1994); Cook v. Boorstin, 763 F.2d 1462, 1470 (D.C. Cir. 1985) ("[A]n intervenor of right, just like an ordinary plaintiff, must have standing."); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984) (Article III requires that Rule 24 "interest" requirement be interpreted to refer only to "legally protectable interests").

560, 561 (1992) (elements of standing doctrine are not "mere pleading requirements" but are "indispensable part" of case). The Supreme Court has often emphasized that a lawsuit in federal court is not a forum for the airing of interested onlookers' concerns, nor an arena for public-policy debates. See, e.g., Valley Forge, 454 U.S. at 473 (Article III "forecloses the conversion of courts of the United States into judicial versions of college debating forums."). While Rule 24 promotes judicial economy by facilitating, where constitutionally permissible, the participation of interested parties in others' lawsuits, the fact remains that a federal case is a limited affair, and not everyone with an opinion is invited to attend.

III.

Having decided that those wishing to intervene in federal court must have Article III standing, we must now determine whether the Association passes this test. We think it does. In Lujan, the Supreme Court held that the "irreducible constitutional minimum of standing" required by Article III has three elements: First, the would-be litigant must have suffered an "injury in fact"; that is, an "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical . . .." Lujan, 504 U.S. at 560 (internal quotation marks and citations omitted). Second, the would-be litigant must establish a causal connection between the alleged injury and the conduct being challenged. Ibid. Third, he must show that the injury is likely to be redressed by a favorable decision. Id. at 561; see Friends of the Boundary Waters Wilderness v. Thomas, 53 F.3d 881, 886 (8th Cir. 1995) (standing requires (1) injury in fact, (2) causation, and (3) redressability).

As we noted in Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994), "[c]omplaints of environmental and

aesthetic harms are sufficient to lay the basis for standing." See also Lujan, 504 U.S. at 562-63 ("[T]he desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing."). The injuries alleged, however, must be imminent and direct, not hypothetical or fantastic. In Lujan, the Court emphasized that vague expressions of a hope to observe animals, in remote countries half-way around the world, "someday," could not establish the constitutionally required "actual or imminent injury." Id. at 563-64. For example, one member of the environmental group in Lujan said that she hoped to visit Sri Lanka someday and see leopards and elephants. When pressed, however, she admitted that her "hope" was not and could not be a "plan," because of a civil war. Id. at 564.

The alleged injuries in Lujan were far more speculative than those alleged here. In this case, the Association has submitted affidavits from several of its members stating that they have visited the Park in the past, that they plan to do so in the near and identifiable future, and that they will be injured directly if the restrictions on snowmobiling are lifted. Jennifer Hunt, Executive Director of the Voyageurs Region National Park Association, swore that she visits the Park at least twice a year, and described specific, imminent, future trips she had planned. She described her activities in the Park and how she thinks she would be affected if the restrictions on snowmobiling were lifted. Joe Kotnik, another member, submitted a similarly detailed affidavit. These members claim that snowmobiling will threaten the Park's eagles and wolves and detract from their enjoyment of the Park's tranquility and beauty. The Association has alleged concrete, imminent, and redressable injuries in fact, which are neither "conjectural" nor "hypothetical." Cf. Lujan, 504 U.S. at 567 (rejecting environmental group's claims of injury as "pure speculation and fantasy"); Sierra Club, 28 F.3d at 758-60 (asserted injuries

were only potential, not imminent; challenged forest plan was merely a general planning tool).

In fact, the Association's case for Article III standing is basically the same as the Snowmobilers'. The District Court held that the Snowmobilers have standing because they have shown that

> they have used and wish to continue using the Park's now-restricted areas for snowmobiling and wildlife observation. Plaintiffs claim they have been harmed by the closures because they are prevented from observing wolves in their natural habitat. Plaintiffs also contend they have been injured because the closures were imposed without a proper basis

Mausolf II, 913 F. Supp. at 1341. Thus, the District Court held, the Snowmobilers had alleged concrete, particularized, and immediate injuries, which were caused by the restrictions on snowmobiling and which could be redressed by the relief the Snowmobilers seek. Ibid. The same is true, mutatis mutandis, for the Association.

This case is a lot like Friends of the Boundary Waters, supra. There, an environmental group challenged certain portions of the Superior National Forest's management plan. The plan would have allowed motorized portages in the Boundary Waters Canoe Area Wilderness and would have increased below-cost timber sales. 53 F.3d at 883-84. The environmental group's members filed affidavits "replete with allegations of the injuries that would result from the Plan's proposed increase in below-cost timber sales." Id. at 886. The district court had found that the planned timber sales would damage certain tree species and reduce tree diversity, and that the group's alleged injuries would likely be redressed by returning to the pre-plan levels of below-cost timber sales. Therefore, we held that the environmental group had Article

III standing. Id. at 886-87. We distinguished Sierra Club, 28 F.3d 753 (8th Cir. 1994), noting that the forest plan in that case was a general planning tool for the future, while the plan at issue in Friends of the Boundary Waters explicitly identified the area to be harvested. Friends, 53 F.3d at 887. The snowmobiling restrictions at issue in this case are similarly definite and imminent. We therefore hold that the Association has the Article III standing required for intervention in this lawsuit.

IV.

Because the Association has standing, the District Court could have granted the motion to intervene. We must now decide whether it should have. The District Court denied the motion for intervention as of right and for permissive intervention, and instead permitted the Association to participate as amicus curiae. Mausolf I, 158 F.R.D. at 148. The District Court reasoned that the Association's interests were adequately protected by the government, id. at 147-48, and that, if permitted to intervene, the Association would likely prejudice the rights of the original parties by delaying the case with additional discovery. Id. at 148. We review the District Court's denial of the Association's motion to intervene as of right de novo, Sierra Club v. Robertson, 960 F.2d 83, 85 (8th Cir. 1992). Because we conclude that the Association should have been allowed to intervene as of right, we need not discuss whether the District Court abused its discretion by not granting permissive intervention.

We agree with the District Court that the Association has an interest in preventing unrestricted snowmobiling and in vindicating a conservationist vision for the Park. The Association has consistently demonstrated its interest in the Park's well-being (as it sees it) and has worked hard over the years, in various proceedings, to protect that interest. See

Mausolf I, 158 F.R.D. at 146-47. We also agree with the District Court's conclusion that the Association's interests might suffer if the Government were to lose this case, or to settle it against the Association's interests. Id. at 147. The only question left for us to consider, then, is whether the District Court correctly held that Association's interests were adequately protected by the Government.

Usually, Rule 24 (a)'s third criterion is easy to satisfy, and the would-be intervenor faces a "minimal burden" of showing that its interests are not adequately represented by the parties. Mille Lacs, 989 F.2d at. 999. But when one of the parties is an arm or agency of the government, and the case concerns a matter of "sovereign interest," the bar is raised, because in such cases the government is "presumed to represent the interests of all its citizens." Id. at 1000 (citation omitted); United States v. Union Elec. Co., 64 F. 3d 1152, 1168-69 (8th Cir. 1995). We emphasize that the parens patriae presumption applies "in such cases" because it does not necessarily apply in all cases to which the government is a party. After all, when the proposed intervenors' concern is not a matter of "sovereign interest," there is no reason to think the government will represent it. See Mille Lacs, 989 F.2d at 1001 (parens patriae doctrine did not apply because "[t]he counties' interests in land are narrower interests not subsumed in the general interest Minnesota asserts in protecting fish and game"); Union Elec. Co., 64 F.3d at 1170 (holding that EPA did not adequately represent proposed intervenors' "parochial" interest in avoiding liability).

Here, however, we agree with the District Court that the Association's conservation interests are concerns that the Government, as parens patriae, is charged with protecting, and that the presumption of adequate representation therefore applies in this case. See Mausolf I, 158 F.R.D. at 147. This presumption may be rebutted, though, when a would-be intervenor makes a strong showing of inadequate

representation. See 7C Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1909 (2d ed. 1986). That is, the presumption of adequate representation may be "rebutted by a showing that the applicant's interest cannot be subsumed within the shared interest of the citizens . . .." Union Elec. Co., 64 F.3d at 1169.

The Association has rebutted the parens patriae presumption in this case. Its concerns about the Government's enthusiasm for defending the snowmobiling restrictions are not grounded, as the Snowmobilers charge, in a nebulous and paranoid "distrust of government," but in the well-documented history of this particular case and controversy. The Association sued the Government in an earlier case concerning snowmobiling in the Park precisely because it thought the Government was not adequately representing the Association's interests. See VRNPA, supra. In fact, this earlier lawsuit is probably the reason for the current regulations. It is unquestioned that, in the past, the Government has waived and failed to enforce regulations against snowmobile use in the Park. Id. at *8. The Government also "breached [its] obligation under the Voyageurs National Park Act to make a wilderness recommendation within four years of . . . the park's establishment." Id. at *11.

The Snowmobilers insist that the Government, like the Association, is interested in protecting wildlife and in upholding environmental regulations. See Mausolf I, 158 F.R.D. at 147 ("The Defendants represent the citizenry on matters of wildlife and wilderness preservation . . ..") This is true; it does not, however, answer the Association's objection that this interest is not adequately represented by the Government in this case. Unlike the Association, the Government is "obliged to represent . . . all of its citizens." Sierra Club, 960 F.2d at 86; see also In re Sierra Club, 945 F.2d 776, 780 (4th Cir. 1991) (noting that "[a]lthough the interests of the Sierra Club and [the Government] may

converge . . . they may [also] diverge . . ..). When managing and regulating public lands, to avoid what economists call the "tragedy of the commons," the Government must inevitably favor certain uses over others. The Park was established for both recreational and conservationist purposes. Voyageurs National Park Act, 16 U.S.C. § 160 et seq. These purposes will sometimes, unavoidably, conflict, and even the Government cannot always adequately represent conflicting interests at the same time. See Sierra Club, 960 F.2d at 86 (contrasting State of Arkansas's many competing interests with those of environmental group); United States v. Reserve Mining Co., 56 F.R.D. 408, 419 (D. Minn. 1972) ("The United States is charged with representing a broad public interest and . . . must represent varying interest[s], industry as well as individuals."). In this case, the Government's interest in promoting recreational activity and tourism in the Park, an interest many citizens share, may be adverse to the Association's conservation interests, interests also shared by many.

V.

In conclusion: The Constitution requires that Rule 24 intervenors have Article III standing; the Association has standing; and it has rebutted any presumption that the Government will adequately represent its interests in this litigation. Therefore, the District Court should have allowed the Association to intervene as of right. The District Court's order denying intervention is reversed. The District Court is directed to enter an order granting the Association's motion for leave to intervene as of right.

WOLLMAN, Circuit Judge, concurring and dissenting.

I concur in all of the court's opinion except the holding that a party seeking to intervene must have Article III standing. On that issue, I agree with the arguments advanced by the Association, as so well restated in the court's opinion.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

I concur in all of the court's opinion except the holding that the presumption that the government is acting as parens patriae has been rebutted.

In order to qualify as one of the "very rare cases in which a member of the public is allowed to intervene in an action in which the United States ... represents the public interest," the Association must make "a very strong showing of inadequate representation." 7C Wright et al., supra, § 1909 at 342-43. The Association asserts that the government's prior failures to embrace its view of the proper emphasis to place on conservation suffice to make that showing, but I do not think that they do. Although the Association and the government have differed over the issues relevant to this case in the past, the government has more recently demonstrated a strong inclination to champion the Association's environmental concerns. In fact, as the court itself observes, the Snowmobilers initiated this case because the government's snowmobiling limitations were more restrictive than those proposed in the 1991 wilderness plan, even though the Fish and Wildlife Service concluded that the wilderness plan posed no threat whatever to Park wildlife. The Association points to no specific evidence that the government has not diligently defended the relevant restrictions, or that it is likely to become irresolute in this respect in the future. In such circumstances, I cannot conclude that the Association has made a showing, much less a "very strong showing," id., of inadequate representation by the government.

In fact, the present interests of the government and the Association are essentially identical, both tactically and substantively. See Sierra Club, 960 F.2d at 86. Both seek the continued enforcement of the snowmobiling restrictions. By doing so, both seek to prevent snowmobiling in large areas of the Park, thereby preserving the Park's tranquility and going the extra mile to protect Park wildlife. It is true that conservation is but one of a panoply of interests that the government is obliged to represent. Id. But the fact that government is charged with representing the interests of all citizens, and that some citizens do not share the Association's zeal for conservation, is not enough to overcome the presumption of adequate representation. If it were, the parens patriae doctrine would serve no useful purpose, because it would be rebutted in virtually every case. It is important to understand that the government is not obliged to be as zealous about conservation as the Association is. It is merely obliged to be properly solicitous of conservation as one use among the many competing uses to which parks can be put. There is simply insufficient evidence in this record to rebut the presumption of proper governmental solicitousness.

I therefore respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
5-94-CV-8

Jeffrey Mausolf; William Kullberg; Arlys Strehlo; Minnesota United Snowmobilers Association,	)	
Plaintiffs,	)	
v.	)	
Bruce Babbitt, Secretary, Department of the Interior,	)	
Defendant,	)	
and	)	ORDER
Voyageurs Region National Park Association; Sierra Club, North Star Chapter; The Humane Society of the United States; The Friends of the Boundary Waters Wilderness; The National Parks and Conservation Association; Izaak Walton League of America; and The Wilderness Society,	)	
Applicants for Intervention.	)	

This matter is before the Court on appeal by the applicants for intervention ("Voyageurs Association") of a

September 7, 1994, Order by the Honorable Raymond L. Erickson, United States Magistrate Judge. Although the Magistrate denied the motion to intervene, he granted Voyageurs Association amicus curiae status. Voyageurs Association filed a timely appeal of this order, pursuant to Local Rule 72.1(b)(2).

Voyageurs Association argues that it has the right to intervene in this matter, pursuant to Rule 24, Federal Rules of Civil Procedure. Plaintiffs oppose the appeal.

The district court must set aside any portion of a magistrate's order found to be "clearly erroneous or contrary to law." 28 U.S.C. § 636; D.Minn.L.R. 72.1(b)(2). The Court has reviewed the record and proceedings below and finds no grounds to justify setting aside the Order. The Magistrate's Order is neither clearly erroneous nor contrary to law.

Accordingly, based upon the files, records, and proceedings herein, IT IS ORDERED that:

The Magistrate's Order of September 7, 1994, is affirmed in all respects.

Dated: November 9th, 1994

/s/
JAMES M. ROSENBAUM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH-DIVISION

* *

Jeffrey Mausolf; William Kullberg; Arlys Strehlo; Minnesota United Snowmobilers Association,

Plaintiffs,

vs. ORDER

Bruce Babbitt, Secretary, Department of the Interior; Roger Kennedy, Director, National Park Service; Mollie Beattie, Director, U.S. Fish and Wildlife Service; Ben Clary, Superintendent, Voyageurs National Park,

Defendants. Civ. No. 5-94-8

and

Voyageurs Region National Park Association; Sierra Club, North Star Chapter; The Humane Society of the United States; The Friends of the Boundary Waters Wilderness; The National Park and Conservation Association; and Izaak Walton League of America.

Applicants for Intervention.

* *

At Duluth, in the District of Minnesota, this 7th day of September, 1994.

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b) (1) (A) and (B), upon the filing of a Motion to Intervene by the Voyageurs Region National Park Association and various other environmental groups which, for purposes of convenience, we will jointly refer to as the "Association."

At the Hearing on the Motion, the Plaintiffs appeared by Corey J. Ayling, Esq., the Defendants appeared by Joseph R. Perella, Esq., and the putative Intervenors appeared by Michael A. Ponto, Esq.

For reasons which follow, we deny the Motion to Intervene but we grant the Association amicus curiae status.

II. Factual and Procedural Background

By a Complaint filed on January 14, 1994, the Plaintiffs have urged the Court to judicially review the Defendant's administrative decision to impose certain restrictions upon snowmobiling in the Voyageurs National Park ("the Park"), and to enjoin the Defendants' enforcement of those restrictions. The Plaintiffs are composed of three individuals, each of whom is an avid snowmobiler, and the Minnesota United Snowmobilers Association ("MUSA"). The Defendants include the Secretary of the Department of the Interior, Bruce Babbitt; the Director of the National Park Service, Roger Kennedy; the Director of the U.S. Fish and Wildlife Service, Mollie Beattie; and the Superintendent of Voyageurs National Park, Ben Clary.

The Association seeks intervention, as a full party to these proceedings, because of their acknowledged interest in restricting the use of snowmobiles in the Park, and in maintaining and preserving the pristine nature of this Nation's wildlife and wilderness refuges. In times past, the Association has commenced litigation against certain of the Defendants in an effort to require the affected governmental agencies to consider the propriety of restricting areas of the Park from access by snowmobiles. See, Voyageurs Regional National Park Association, et al. v. Manuel Lujan, et al., Civ. No. 4-90-434.

As noted, the Plaintiffs seek both declaratory and injunctive relief under the Administrative Procedures Act, and they contend that the closure of certain areas of the Park from snowmobiling is an exercise of agency rulemaking that was unsupported by substantial evidence, was arbitrary and capricious, and was in contravention of the Defendants' own procedural mandates. According to the Plaintiffs, not only was the imposition of snowmobiling restrictions an abrupt "about face" on the Defendants' part, but the Defendants failed to consider the best available scientific and commercial data in creating the restrictions that were formulated.

The Defendants have produced the Administrative Record of its rulemaking, which is comprised of internal government memoranda, environmental and wildlife studies, and other data that is pertinent to the implementation of trail plans and restrictions within the Park. The Plaintiff and the Defendants have agreed that this Record contains the basis of their dispute and that, unless something essential is missing from that Record, no further discovery will be implemented. Both the Plaintiffs and the Defendants have now filed their respective Motions for Summary Judgment.

Insofar as its interests are concerned, the Association does not contest the propriety of the restrictions that the Defendants have imposed upon the use of snowmobiles within

the Park. Accordingly, if permitted to appear as a Defendant in this matter, the Association would seek the dismissal of the Plaintiffs' claim. While the Association is keenly interested in intervention, so as to forestall or preclude the potential that the Defendants might modify the restrictions that have been promulgated, in an effort to amicably resolve this matter, there is no showing that the Association participated in the administrative proceedings which resulted in the restrictions that the Plaintiffs here contest.

For their part, the Plaintiffs implicitly accede to the appreciable interest that the Association has in regulating the use of snowmobiles in the Park, as the Plaintiffs are amenable to offering the Association amicus status in these proceedings. Nevertheless, the Plaintiffs deny that the Association has such a direct interest as would warrant intervention and they maintain that, in any event, whatever interests the Association might have, those interests are adequately promoted by the Defendants, as responsible governmental officials. On their own behalf, the Defendants do not object to the Association's intervention, although they underscore that their "lack of objections * * * does not constitute an endorsement of the statements made in [the Association's] application" for intervention.

III. Discussion

Under Rule 24(a)(2),[1] Federal Rules of Civil Procedure, a party has the right to intervene in an action upon timely application:

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[1] Rule 24(a)(1), Federal Rules of Civil Procedure, permits intervention of right "when a statute of the United States confers an unconditional right to intervene. The Association does not rely on any such statute, and we find this basis for intervention of right to be wholly inapplicable.

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(b)(2)[2] also provides for permissive intervention by parties:

> [W]hen an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Notably, the parties do not dispute the timeliness of the Motion to Intervene and, therefore, the issues before us resolve to whether intervention is proper either as of right, or permissively. We address each of these means to intervention in turn.

A. Intervention as of Right. As the language of Rule 24(a) makes clear, one seeking intervention "must satisfy a tripartite test: 1) the party must have a recognized interest in the subject matter of the litigation; 2) that interest must be one that might be impaired by the disposition of the litigation; 3) the interest must not be adequately protected by the existing

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[2] Rule 24(b)(1) allows permissive intervention "when a statute of the United States confers a conditional right to intervene." Here again, the Association has not premised its Motion to Intervene upon any statute which, conditionally, confers an intervention right, and we do not address the provisions of Rule 24(b)(1) further.

parties." Mille Lacs Bank of Indians v. Minnesota, 989 F.2d 994, 997 (8th Cir. 1993).

The first issue, then, is whether the Association has a substantial interest in the subject matter of this litigation. The Association contends that, as a collection of non-profit, public interest organizations, its interest in party status is to assure the protection and the preservation of the Park and its resources. Our Court of Appeals has held that an interest -- such as would merit intervenor status -- must be more than "peripheral or insubstantial; the applicant must assert a 'significantly protectable interest.'" Planned Parenthood v. Citizens for Comm. Action, 558 F.2d 861, 869 (8th Cir. 1977) (citing Donaldson v. United States, 400 U.S. 517, 531 (1971)).

Relying upon the Supreme Court's analysis in Lujan v. Defenders of Wildlife, --- U.S. ---, 112 S.Ct. 2130 (1992), the Plaintiffs urge that, since the Association would not have standing to sue these Defendants -- because it has purportedly suffered no injury in fact -- the Association should not be allowed to intervene. We decline, however, the Plaintiffs' invitation to equate the requisites of the standing to sue doctrine with the level of interest which would merit intervenor status. The Federal Rules of Civil Procedure do not demand that a party have standing to sue in order to intervene as a party, the Supreme Court has declined to decide whether an intervenor must have such standing, Diamond v. Charles, 476 U.S. 54, 69 (1986), and our Court of Appeals imposes no such standing requirement.[3] The question of

[3] Our review has failed to disclose any case in which our Court of Appeals has expressly discussed the applicability of the standing doctrine to the issue of intervention as of right. As recognized by the Supreme Court in Diamond v. Charles, 476 U.S. 61, 69 n. 21 (1986), the Court of Appeals for the Eighth Circuit resolves questions of intervention without reference to the standing doctrine. See, e.g., Mille Lacs Bank of Indians v. Minnesota, 989 F.2d 994, 997 (8th Cir. 1993); Planned Parenthood v. Citizens for Comm. Action, 558 F.2d 861, 869 (8th Cir. 1977).

standing, therefore, is irrelevant to our determination of whether the Association may intervene as of right.[4]

The Association has asserted a specific interest in the use of the Park, and in preserving the Park from the harms of unrestricted snowmobiling, on aesthetic, scientific and recreational grounds. The Association notes that such a "substantial interest" has been found adequate, for intervention purposes, in the past. In particular, the Association draws our attention to United States v. Reserve Mining Co., 56 F.R.D. 408, 418 (D. Minn. 1972), where various environmental organizations were permitted to intervene, as of right, in order to protect their interest in abating any potentially contaminating sources to Lake Superior. In response, the Plaintiffs seek to distinguish the Court's reasoning in Reserve by obliquely asserting that the decision "primarily concern[ed] interventions by a governmental body." While the distinction is true -- at least as a general observation -- the Court did not so broadly gloss the characteristics of the private, environmental associations in granting them intervenor status in that case. On the record before us, we find that the Association has had a continuing and recognized interest in assisting in the management of snowmobiling in the Park that

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[4] Accordingly, we need not further address the Article III considerations which drive a standing to sue analysis. See, e.g., Lujan v. Defenders of Wildlife, --- U.S. ---, 112 S.Ct. 2130 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Sierra Club v. Robertson, 28 F.3d 753 (8th Cir. 1994). Suffice it to say that, even if we were to conclude that the Association was unable to demonstrate "an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," we would not preclude intervenor status so long as the Association had a "recognized interest in the subject of the litigation." Mille Lacs Band of Indians v. Minnesota, supra at 997.

may appropriately be characterized as a "significantly protectable interest."[5]

Having found a recognized interest, we have no hesitancy in concluding that, under the second prong of Rule 24(a)(2), an adverse ruling would impair the Association's ability to protect the wildlife and wilderness qualities of the Park. Indeed, we do not understand the Plaintiffs to be challenging the Association's ability to satisfy this aspect of the intervention analysis, so long as the Association had satisfied the first prong of Rule 24's requisites for intervention.

Accordingly, our analysis turns to the final inquiry under Rule 24(a)(2); namely, whether the Association's interests are adequately represented by the existing Defendants. Ordinarily, parties seeking intervention need only satisfy a "minimal burden" of demonstrating that their interests will not be adequately represented by the then current parties to the suit. Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10 (1972); Mille Lacs Band of Indians v. Minnesota, supra at 999 (8th Cir. 1993). Under this final step in the analysis, the Courts determine "the adequacy of representation primarily by comparing the interests of the proposed intervenor with the interests of the current parties to the action." Sierra Club v. Robertson, 960 F.2d 83, 86 (1992).

When one of the parties is a governmental entity, however, the test is more exacting because of the doctrine of parens patriae. Mille Lacs Band of Indians v. Minnesota,

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[5] While we have not independently conducted a standing to sue analysis, our conclusion that the Association has a "significantly protectable interest" is corroborated by the District Court's finding, in Voyageurs Regional National Park Association, et al. v. Manuel Lujan, et al., supra, that the Association had satisfied the "two-part standing test outlined by the Supreme Court in Lujan [v. National Wildlife Federation, supra]."

supra at 1000.[6] This doctrine presumes that a State will represent all of the interests of its citizens for intervention purposes. Id. The Defendants represent the citizenry on matters of wildlife and wilderness preservation and, while the Association may not always agree with the stances taken by those Defendants either nationally or within the Park, we are unable to find an adequate showing by the Association, that it possesses special, parochial or private interests which warrant a separate party status as to these proceedings. We are not unmindful that, in the last go-around, the Defendants were on obverse sides of the conflict with the Association. We suspect, without knowing, that their interests in other aspects of the management of the Defendants' management of the Park may also be at odds. Nevertheless, as to the specific issues in contest in these proceedings, the Association has not persuasively isolated any specific interest that will go unprotected if its Motion to Intervene is denied.

We find unpersuasive the Association's contention that the Defendants, by and large, have national interests in mind and not the betterment of the Park as their foremost priority. Nor do we find the Association's reliance on the Mille Lacs case to be well-placed. There, our Court of Appeals concluded that the State of Minnesota could not adequately represent the interests of individual counties and landowners who sought to protect the value of their lands from disparagement if an

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[6] As noted by the Court in Mille Lacs Band of Indians v. Minnesota, supra at 1000:

> Under the parens patriae concept * * * a state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens. Thus, to intervene in a suit in district court in which a state is already a party, a citizen or subdivision of that state must overcome this presumption of adequate representation.

Quoting, Environmental Defense Fund, Inc. v. Higginson, 631 F.2d 738 (D.C. Cir. 1979).

Indian Band should be granted certain fishing and gaming rights there at issue. The Court based its determination on the decisional case law which holds that the narrower interest of an intervenor may not be subsumed within a government's broader public interest. Id.; Dimond v. District of Columbia, 792 F.2d 179, 192-93 (D.C. Cir. 1986). In Mille Lacs, the Court reasoned that the general presumption of adequate representation by a governmental party may be rebutted with a showing of "local and individual interests not shared by the general citizenry." Mille Lacs Band of Indians v. Minnesota, supra at 1001.

As a consequence, although a Government party will usually represent the general interests of its citizens, private interests such as an interest in property, in property valuations or in financial interests, may not be adequately protected by the Government's status as parens patriae. Id.; Planned Parenthood v. Citizens for Comm. Action, supra at 870. In the present case, the Association has not identified a specific interest in the litigation that would not be adequately protected by the Government. The Association's interest in the protection of wildlife and of the recreational uses of the Park are general interests that are shared by the citizenry, and do not rise to the level of a property interest. Sierra Club v. Robertson, supra at 86.[7]

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[7] While not dispositive of the issue before us, we note that, in Voyageurs Regional National Park Association, et al. v. Manuel Lujan, supra, the District Court denied intervention to certain of the Plaintiffs here as their interests, in defending against the claims of the Association, were adequately represented by the Government. Here, the tables are reversed, and now it is the Association which is alleging an inadequacy in the Government's ability to represent its interests. We think the reasoning of the District Court in Voyageurs Regional National Park, in finding an adequacy in the Government to represent the interests of its citizens, including public interest, recreational groups, is fully applicable here. As was the circumstance in the Voyageurs Regional National Park

While we adhere to the general policy within this Circuit which resolves any doubts in favor of allowing intervention so as to serve the "judicial system's interest in resolving all related controversies in a single action," Sierra Club v. Robertson, 960 F.2d 83, 86 (8th Cir. 1992); Kozak v. Wells, 278 F.2d 104, 112 (8th Cir. 1960), here we are not presented with a doubtful case. Since the Association's posture and interests are adequately served by the Defendants, we deny the Association's Motion to Intervene.

B. Permissive Intervention. Under the doctrine of permissive intervention, the Court has broad discretion to allow intervention if the "claim or defense and the main action have a question of law or fact in common." Rule 24(b)(2), Federal Rules of Civil Procedure. The Rule cautions, however, that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id. The original parties have agreed to limited discovery and are ready to proceed with the case. If the Association were allowed to join with party status, the future processing of this action would be subject to the Association's interest in conducting such discovery and further joinder of issues and parties as the Association might believe are in its best interests. Although the Court has the discretion to allow intervention in this case, we decline to do so as we are firmly of the belief that the Association's interests in addressing the issues before the Court are fully served by an amicus curiae status.

C. Status as Amicus Curiae. A District Court has broad inherent authority to permit or deny an appearance as amicus curiae in a given case. United States v. Ahmed, 788 F. Supp. 196, 198 n. 1 (S.D.N.Y. 192), aff'd, 980 F.2d 161 (2d Cir. 1992). The amicus privilege "rests in the discretion of the

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case, the Association here has not substantiated any private interest in this litigation which is not duplicative of the interests of the Defendants.

court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise." Leigh v. Engle, 535 F. Supp. 418, 420 (N.D. Ill. 982).

Upon our close review of the Association's Motion papers, we are satisfied that it has knowledge, experience and a perspective, all of which are specifically related to the Park, which may assist the Court in its resolution of the issues raised by the parties in this case. Accordingly, we grant the Association the opportunity to appear amicus in this proceeding and, upon its request, the Association may file with the Court a Memorandum of Law which will conform to all applicable Local Rules, and which will address the respective Summary Judgment Motions of the parties.

NOW, THEREFORE, It is --

ORDERED:

1. That the Association's Motion to Intervene [Docket No. 4] is DENIED.

2. That the Court grants the Association, sua sponte, the opportunity to appear amicus curiae, and to submit its position on the parties' respective Summary Judgment Motions, by the service and filing of a Memorandum of Law, and to address any other issues that may arise in these proceedings upon a request to, and leave granted by, the District Court.

BY THE COURT:
/s/
Raymond L. Erickson
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-1856MND

Jeffrey Mausolf, et al,	*
	*
Appellees,	*
	* Order Denying Petition for
v.	* Rehearing and Suggestion
	* for Rehearing En Banc
Voyageurs Region National Park	*
Association, et al,	*
	*
Appellants.	*

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 3, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
U.S. COURT & CUSTOM HOUSE
1114 MARKET STREET
ST. LOUIS, MISSOURI 63101

MICHAEL E. GANS
Clerk of Court

VOICE (314) 539-3600
ABBS (800) 652-8671
http:/ls.wustl.edu/8th.cir

September 23, 1997

Mr. Brian B. O'Neill
FAEGRE & BENSON
2200 Norwest Center
90 S. Seventh Street
Minneapolis, MN 55402-3901

Re: 96-1856MND Jeffrey Mausolf vs. Voyageurs Region

Dear Counsel:

Enclosed is a copy of the opinion filed today in the referenced case. Judgment in accordance with the opinion was also entered today.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and suggestions for rehearing en banc must be received in the clerk's office within 45 days of the date of the entry of judgment. No grace period for mailing is allowed, and the date of the postmark is irrelevant. Any petition for rehearing or suggestion for rehearing en banc which is not received

within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Sincererly,

/s/

Michael E. Gans
Clerk of Court

mam

Enclosure(s)

cc: Rebecca J. Heltzer
Corey John Ayling
Elizabeth Hendricks Schmiesing
Richard Alan Duncan
Michael A. Ponto
Frank Dosal

District Court/Agency Case Number(s): Civ 5-94-08

Supreme Court, U.S.
FILED
MAY 29 1998
CLERK

No. 97-1443

In the Supreme Court of the United States

OCTOBER TERM, 1997

JEFFREY MAUSOLF, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

JAMES C. KILBOURNE
ROBERT L. KLARQUIST
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

18pp

QUESTIONS PRESENTED

1. Whether the complaint filed by petitioners in this case, which sought judicial review of a 1992 order by which the Superintendent of Voyageurs National Park temporarily closed certain areas of the Park to snowmobiling, presents any currently justiciable issue in light of the court of appeals' uncontested finding that such closure orders remain in effect for a maximum period of one year.

2. Whether the government's decision not to appeal from the district court's judgment invalidating the 1992 closure order precluded the private intervenors from pursuing their own appeal.

3. Whether the National Park Service Organic Act authorizes the National Park Service to undertake wildlife preservation measures that are neither compelled nor prohibited by the Endangered Species Act.

4. Whether the closure order at issue in this case was arbitrary and capricious.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1443

JEFFREY MAUSOLF, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-18A) is reported at 125 F.3d 661. An earlier opinion of the court of appeals concerning the intervention motion of the non-federal respondents (Pet. App. 43A-62A) is reported at 85 F.3d 1295. The opinion of the district court (Pet. App. 21A-42A) is reported at 913 F. Supp. 1334. The district court's order regarding the intervention motion (Pet. App. 63A-64A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1997. A petition for rehearing was

denied on December 3, 1997. Pet. App. 77A. The petition for a writ of certiorari was filed on March 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Park Service Organic Act (1916 Organic Act) created the National Park Service (NPS) within the Department of the Interior. See Act of August 25, 1916, ch. 408, 39 Stat. 535. Congress has charged the NPS with the duties of

> promot[ing] and regulat[ing] the use of the Federal areas known as national parks, monuments, and reservations * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. 1 (Supp. II 1996). Congress has further provided that "[t]he Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." 16 U.S.C. 3 (Supp. II 1996).

In 1971, Congress enacted legislation authorizing the Secretary of the Interior to establish Voyageurs National Park (VNP). See Act of January 8, 1971, Pub. L. No. 91-661, 84 Stat. 1970 (codified as amended at 16 U.S.C. 160-160k (Supp. II 1996)). The 1971 Act

directs the NPS to administer VNP pursuant to the 1916 Organic Act "[e]xcept as hereinafter provided," 16 U.S.C. 160f(a), and provides that "[t]he Secretary may, when planning for development of the park, include appropriate provisions for * * * winter sports, including the use of snowmobiles," 16 U.S.C. 160h.

Voyageurs National Park is comprised of nearly 220,000 acres in northern Minnesota. Approximately 39% of the Park's area is made up of lakes or other waterbodies. Several packs of gray wolves have all or a part of their territory within the Park. The gray wolf population in Minnesota is listed as a threatened species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* (Supp. II 1996). See Pet. App. 24A-25A.

2. a. In 1991, the NPS issued regulations concerning snowmobiling in VNP. The regulations allowed snowmobiling on nearly all of the surface areas of VNP's four major lakes. 36 C.F.R. 7.33(b); Pet. App. 27A. The regulations also provided that "[t]he Superintendent may determine yearly opening and closing dates for snowmobile use, and temporarily close trails or lake surfaces, taking into consideration public safety, wildlife management, weather, and park management objectives." 36 C.F.R. 7.33(b)(3).

The Voyageurs Region National Park Association (a non-federal respondent here) challenged the 1991 regulations, contending that they were unlawful because the NPS had issued them without first preparing a wilderness area suitability study pursuant to Section 301(b) of the 1971 Act, 16 U.S.C. 160f(b).[1] The

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[1] Section 301(b) provided that such a study was to be issued within four years of the Park's establishment.

district court directed the NPS to prepare the wilderness plan, but it declined to enjoin snowmobiling in VNP pending completion of that plan. The court of appeals upheld the district court's decision not to issue an injunction. *Voyageurs Region Nat'l Park Ass'n.* v. *Lujan*, 966 F.2d 424 (8th Cir. 1992).

b. In 1991, the NPS released a draft wilderness plan for the VNP. Under that draft plan, snowmobiling would be allowed to continue upon the surfaces of the Park's four major lakes. Pet. App. 29A. Pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), the NPS consulted with the Fish and Wildlife Service (FWS), an agency within the Department of the Interior, concerning the proposed plan.[2] The FWS issued

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[2] Section 7(a)(2) of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with the FWS, which provides the agency with a written statement (the biological opinion) explaining how the proposed action will affect the species or its habitat. If the FWS concludes that the proposed action will jeopardize the continued existence of a listed species, the biological opinion must outline any "reasonable and prudent alternatives" that the FWS believes will avoid that consequence. 16 U.S.C. 1536(b)(3)(A). If the biological opinion concludes that the agency action will not result in jeopardy, or if it offers reasonable and prudent alternatives to avoid that consequence, the FWS must provide the agency with a written statement (known as an incidental take statement) specifying the "impact of such incidental taking on the species" and any "reasonable and prudent measures that the [FWS] considers necessary or appropriate to minimize such impact," and setting forth "the terms and conditions * * * that must be complied with by the Federal agency * * * to implement [those] measures."

a biqlogical opinion (see note 2, *supra*) concluding that implementation of the proposed plan was not likely to jeopardize the continued existence of any listed species. Pet. App. 30A. The opinion authorized the incidental taking of up to six wolves annually, contingent upon the NPS's implementation of reasonable and prudent measures that the FWS determined were necessary and appropriate to minimize harm to the gray wolf. Those reasonable and prudent measures included the closure to snowmobiling of certain bays and certain areas adjacent to portions of the shores of the Park's four major lakes. See *id.* at 4A, 29A-32A.[3]

c. In December 1992, the Superintendent of VNP signed an order closing certain bays or lakeshore areas of the Park's four major lakes to snowmobiling. Pet. App. 31A. The closure order was issued pursuant to 36 C.F.R. 7.33(b)(3), which authorizes the temporary closure of lake surfaces for wildlife management purposes. Pet. App. 4A-5A, 31A. The areas subject to the closure order comprised approximately seven percent of the Park's total water acreage. *Id.* at 5A n.5. Substantially identical closure orders were issued in 1993 and 1994. *Id.* at 5A.

3. a. Petitioners in this case are the Minnesota United Snowmobilers Association and three individual members of that organization. Pet. App. 34A. In January 1994, petitioners commenced this action

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16 U.S.C. 1536(b)(4). See *Bennett* v. *Spear*, 117 S. Ct. 1154, 1159 (1997).

[3] The FWS later issued a supplement to the biological opinion, which, *inter alia*, reduced the permissible number of incidental takings from six to two wolves per year. See Pet. App. 5A-6A, 32A-33A.

against the Secretary of the Interior and officials of the NPS and FWS. Petitioners alleged that the 1992 closure order was arbitrary and capricious because it lacked a sufficient evidentiary basis. *Id.* at 32A, 34A.

The district court granted petitioners' motion for summary judgment. Pet. App. 21A-42A. While rejecting petitioners' categorical assertion that wholly anecdotal evidence cannot suffice to support an ESA biological opinion, see *id.* at 39A, the court concluded that "the government's explanation for the lakeshore closures is presently inadequate," *id.* at 41A. The court remanded the matter to the FWS and the NPS with directions to supplement the administrative record with "further evidentiary findings." *Ibid.* The court enjoined the government from enforcing the closures pending the required administrative proceedings. *Ibid.*

b. While the action was pending in the district court, the private respondents—Voyageurs Region National Park Association and several allied groups—moved to intervene as defendants. A magistrate judge denied the intervention motion, Pet. App. 65A-76A, and that ruling was sustained by the district court, *id.* at 63A-64A.

The court of appeals reversed, holding that the private respondents were entitled to intervene as of right. Pet. App. 43A-62A. The court held, *inter alia*, that respondents had standing to sue under Article III of the United States Constitution, based on their allegation that the presence of snowmobiles would detract from their enjoyment of the VNP. *Id.* at 54A-57A.

c. It was while the private respondents' appeal on the intervention question was pending that the district court issued its decision on the merits, dis-

cussed above. Pet. App. 7A. Both the government and the private respondents filed notices of appeal from the district court's decision. *Ibid.* The government subsequently moved for dismissal of its appeal, which the court of appeals granted. *Id.* at 19A. The private respondents, however, continued to prosecute their appeal of the district court's injunctive order.

4. The court of appeals reversed the district court's merits ruling. Pet. App. 1A-18A. The court first concluded that the private respondents could pursue their appeal. *Id.* at 9A-11A. The court observed that respondents had already been determined (on the prior appeal concerning their motion to intervene) to satisfy the standing requirements of Article III. *Id.* at 9A. The court also held that an Article III case or controversy continued to exist notwithstanding the government's dismissal of its own appeal. The court explained that "the government has not revoked the closure order enjoined by the District Court, and the [private respondents] would likely benefit from our decision reversing the District Court and upholding that closure order." *Id.* at 10A.

Turning to the merits, the court of appeals observed that the district court had "analyzed the propriety of the NPS's Park closures solely under the authority granted to the agency by the ESA," Pet. App. 12A, but had "neglected to consider the closures in light of the" Organic Act or pertinent NPS regulations, *id.* at 13A. The court noted in particular that "[t]he 1992 Park closure order, on its face, declares that the order was issued '[u]nder the authority of Title 36, Code of Federal Regulations, Chapter 1, Section 7.33(b)(3).'" See *id.* at 14A. The court rejected petitioners' contention that the clo-

sures could not validly be deemed to be an exercise of the Superintendent's Section 7.33(b)(3) authority because that provision authorizes only "temporary" closures and the 1992 closure order contained no expiration date. The court explained that

> these orders are issued as temporary, annual directives that must be reviewed and either renewed or repealed through yearly compendiums establishing the management goals for the Park. Nothing in the language of the closure order indicates that it is intended to operate as a permanent closure and, because the orders are issued annually, the closures will be reviewed and either renewed or modified on a yearly basis. * * * Consistent with its past practice, we hold that, under 36 C.F.R. § 7.33(b)(3), the NPS must conduct, at minimum, an annual review if snowmobile trails are to be closed "temporarily" and such decisions must be supported by the record.

Pet. App. 14A-15A.

Reviewing the evidence under the "arbitrary [or] capricious" standard established by 5 U.S.C. 706(2)(A), the court of appeals sustained the 1992 closure order as a reasonable exercise of administrative authority. The court found that "[t]he evidence in the administrative record, while not overwhelming, is sufficient to provide a rational foundation on which the NPS could base its closure order." Pet. App. 16A. In light of its finding that "the administrative record supports the closures as measures taken to protect wildlife under 36 C.F.R. § 7.33(b)(3)" and other provisions specifically dealing with national park areas,

the court "decline[d] to consider the propriety of this closure under the ESA." *Id.* at 17A & n.12.

ARGUMENT

Because the closure order that was the subject of petitioners' suit expired more than five years ago, this case no longer presents a justiciable controversy. In any event, the decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals, and the case presents no issue of law warranting review by this Court. The petition for a writ of certiorari should therefore be denied.

1. The court of appeals concluded that closure orders issued by the VNP Superintendent pursuant to 36 C.F.R. 7.33(b)(3) are "temporary, annual directives that must be reviewed and either renewed or repealed through yearly compendiums," and that "the NPS must conduct, at minimum, an annual review if snowmobile trails are to be closed 'temporarily' and such decisions must be supported by the record." Pet. App. 14A-15A. Petitioners do not challenge that aspect of the court of appeals' decision, which is plainly favorable to their interests. Because the closure order that was the original subject of petitioners' challenge was issued in 1992,[4] and because any new closure order would be subject to review upon a new

[4] The court of appeals observed (Pet. App. 14A) that the 1992 closure order was renewed in 1993 and 1994. Neither it nor the district court suggested, however, that the 1993 and 1994 orders were also the subject of judicial review in this case. Even if petitioners' suit is understood as calling into question the validity of the 1993 and 1994 orders, those orders have also expired.

administrative record,[5] this case no longer presents a justiciable controversy. See *American Rivers* v. *National Marine Fisheries Serv.*, 126 F.3d 1118, 1123-1124 (9th Cir. 1997).

2. Even if a live controversy existed, this case would present no issue warranting review by this Court. Relying on *Diamond* v. *Charles*, 476 U.S. 54 (1986), petitioners contend (Pet. 13-19) that the court of appeals erred in holding that the private respondents could pursue their appeal from the district court's judgment after the government had secured a dismissal of its own appeal. Petitioners' reliance on *Diamond* is unavailing. The Court stated in that case that "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." 476 U.S. at 68. It concluded that the appeal should be dismissed because the intervenor lacked any judicially cognizable interest in the outcome of the suit. *Id.* at 64-71. In the present case, by contrast, the court of appeals held that the private respondents satisfied the requirements of Article III, see Pet. App. 54A-57A,[6] and petitioners do not chal-

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[5] As petitioners point out (Pet. 11 & nn. 1-2), the NPS has generated a considerable volume of additional data regarding the impacts of snowmobiling upon wolves since the entry of the district court's 1996 injunctive order.

[6] In holding that the private respondents should be permitted to intervene in the lawsuit, the court of appeals observed that the respondents had "submitted affidavits from several of [their] members stating that they have visited the Park in the past, that they plan to do so in the near and identifiable future, and that they will be injured directly if the

lenge that determination, see Pet. 15 n.5.[7]

Petitioners assert (Pet. 19) that the court of appeals' decision conflicts with the decisions of the First and Sixth Circuits in *United States* v. *AVX Corp.*, 962 F.2d 108 (1st Cir. 1992), and *Associated Builders & Contractors* v. *Perry*, 16 F.3d 688 (6th Cir. 1994), in which the courts dismissed the appeals of non-governmental intervenors after the government declined to pursue its own appeals. In each of those cases, however, the court of appeals found that the non-governmental intervenor lacked standing under Article III. See *AVX Corp.*, 962 F.2d at 112-120; *Associated Builders & Contractors*, 16 F.3d at 690-693. Because the private respondents in the instant case were expressly found to satisfy Article III

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restrictions on snowmobiling are lifted." Pet. App. 55A; see *ibid.* (summarizing specific averments of two members of Voyageurs Region National Park Association). In holding that the private respondents could pursue their appeal notwithstanding the government's dismissal of its own appeal, the court relied on its prior determination that the private respondents had established Article III standing. *Id.* at 8A-9A.

[7] The more apposite precedent is *Bryant* v. *Yellen*, 447 U.S. 352 (1980). In *Yellen*, certain landowners who were receiving irrigation water from a federal project challenged the government's position that they were obligated to comply with the acreage limitations applicable to federal reclamation projects generally. Non-federal entities which asserted that they might be able to purchase lands in the event that the acreage limitations were held to be applicable intervened and were aligned with the government. When the government declined to appeal an adverse district court ruling, this Court, agreeing with the court of appeals' conclusion that the intervenors satisfied Article III standing requirements, held that the intervenors could pursue the case independently on their own behalf. *Id.* at 366-368.

requirements, the decision below does not conflict with the rulings in those cases.[8]

3. Petitioners contend (Pet. 19-25) that the 1916 Organic Act provides no independent authority for the NPS to undertake wildlife protection measures because it has been superseded by the Endangered Species Act. That argument is without merit. Section 1 of the 1916 Organic Act states that the "fundamental purposes" of the national parks are "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1 (Supp. II

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[8] Petitioners suggest that the government "abandon[ed]" the closure order by declining to appeal from the district court's judgment, and that the court of appeals' decision interferes with legitimate Executive Branch prerogatives. See Pet. 14, 18. We do not agree. The court of appeals did not order the government to adopt any particular policy with regard to snowmobiling in Voyageurs National Park; it simply held that "the evidence in the administrative record on which the NPS based its decision to order the Park closures was sufficient to justify the determination and was not arbitrary or capricious." Pet. App. 17A. Petitioners' concern that the court of appeals has imposed a regulatory policy upon the NPS is particularly unwarranted in light of the court's own recognition that a closure order issued pursuant to 36 C.F.R. 7.33(b)(3) may last for no more than a year, and that any new closure order must be supported by a new administrative record. See Pet. App. 14A-15A. Finally, the government cannot properly be said to "abandon" (Pet. 14) a regulatory policy simply by declining to appeal from an adverse district court judgment. Cf. *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984) (observing that the government considers a variety of factors in determining whether an appeal is warranted, and may properly decline to appeal a district court decision that it believes to be erroneous).

1996). The courts of appeals have consistently held that the 1916 Organic Act vests the NPS with broad discretion concerning the allocation of national park uses among competing park user groups. See, *e.g. Bicycle Trails Council of Marin* v. *Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996); *Organized Fishermen of Fla.* v. *Hodel*, 775 F.2d 1544, 1550 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

Petitioners' reliance (Pet. 21-22) on *Bennett* v. *Spear*, 117 S. Ct. 1154 (1997), is misplaced. In *Bennett*, the FWS issued a biological opinion stating that the maintenance of minimum water levels in two federally-managed reservoirs was necessary to avoid jeopardy to two endangered species. The Court, stressing the "virtually determinative" effect of the biological opinion in that case, held that the opinion was subject to judicial review at the behest of private water users who contended that it imposed unduly severe constraints on withdrawals of water from the reservoir. See *id.* at 1165-1169.

Bennett makes clear that where governmental officials exercise coercive power in the course of implementing the ESA, their actions are subject to judicial review. *Bennett* also establishes that the plaintiff in such a lawsuit may contend that the requirements or prohibitions imposed by the government are in fact unnecessary to ensure compliance with the ESA. See 117 S. Ct. at 1168. Nothing in *Bennett* suggests, however, that federal land management officials are prohibited from voluntarily engaging in wildlife protection measures that the ESA itself does not compel.[9]

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[9] Petitioners also suggest in passing (Pet. 5-6, 10) that the 1992 closure order was undertaken solely upon compulsion of

4. Petitioners contend (Pet. 25-27) that the closure order was arbitrary and capricious because the evidence failed to show that snowmobiling would harm the wolves. The court of appeals employed the correct legal standard in conducting its review. It concluded that "the evidence in the administrative record on which the NPS based its decision to order the Park closures was sufficient to justify the determination and that the action was not arbitrary or capricious." Pet. App. 17A. Petitioners' fact-bound challenge to the court of appeals' application of the governing standard does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

JAMES C. KILBOURNE
ROBERT L. KLARQUIST
Attorneys

MAY 1998

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the FWS's biological opinion. The court of appeals, however, treated the closure as an exercise of discretionary authority by the NPS undertaken pursuant to 36 C.F.R. 7.33(b)(3). See Pet. App. 4A-5A, 13A-14A, 17A. Petitioners do not directly challenge that determination, which in any event raises no recurring legal issue. They argue instead that the ESA *precludes* the NPS from relying on the 1916 Organic Act as an independent grant of authority for wildlife protection measures. For the reasons stated above, that argument is without merit.

No. 97-1443

In the
Supreme Court of the United States
October Term, 1997

JEFFREY MAUSOLF, ET AL.,
Petitioners,

vs.

BRUCE BABBITT, ET AL.,
Respondents,

VOYAGEURS REGION NATIONAL PARK ASSOCIATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

Corey J. Ayling
Counsel of Record
Kathleen M. Brennan
McGRANN SHEA FRANZEN CARNIVAL
STRAUGHN & LAMB, CHARTERED
2200 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2041
(612) 338-2525

Attorneys for Petitioners

1998 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

SYNOPSIS

Petitioners contend that judicial review of agency action is over once the agency dismisses its appeal of a successful challenge. Absent this Court's review of the Eighth Circuit's contrary holding, private intervenors will essentially be able to prosecute the agency's appeal as self-appointed guardians of the public interest. In their brief, the Government Respondents ("Government") contend that (1) the underlying challenge to the agency action is itself moot; and (2) the private intervenors had demonstrated Article III standing to intervene before the Government dismissed its case and abandoned its regulations. For the reasons stated below, the first contention is incorrect. It also proves too much: if the underlying challenge was indeed moot, then the Eighth Circuit should be instructed to vacate its opinion below as moot. The second contention is a nonsequitur. What is at issue here is whether these parties ***retained*** their standing once the agency regulations they supported were abandoned by the agency. Moreover, by conceding the existence of an intercircuit conflict, the Government concedes that the case is worthy of certiorari.

SUPPLEMENTAL STATEMENT OF FACTS

On December 16, 1992, the Voyageurs National Park superintendent, following National Park Service and Fish and Wildlife Service orders, issued an addendum to the park's 1992 Compendium of regulations, which closed 18 specific lakeshore and bay areas to snowmobiling ("Lakeshore Closures"). Admin. Record at Tab 53. As part of the 1993 compendium, the park re-issued the same closures. Id. at Tab 57. Again in the 1994 compendium, the park re-issued the same closures. Id. at Tab 59.

In January 1994 the Petitioner Snowmobilers filed a complaint challenging the Government's "about-face" in

snowmobiling policy – beginning with the FWS February 28, 1992 biological opinion and continuing in the 1992 compendium and each subsequent compendium – as arbitrary and capricious. Complaint ¶¶ 28-41. The parties agreed to a three-binder administrative record, and presented cross-motions for summary judgment in August 1994.

In January 1996, the district court granted the Snowmobilers' motion for summary judgment, remanded the matter to the Government for further evidentiary findings and ordered the Government "enjoined from enforcing the lakeshore closures." Mausolf v. Babbitt, 913 F.Supp. 1334, 1344 (D. Minn. 1996), rev'd 125 F.3d 661 (8th Cir. 1997). The Government did not enforce the Lakeshore Closures as it collected additional evidence to justify the closures. See Snowmobilers' Petition for Writ of Certiorari at 11-12 & nn. 1, 2 (detailing Government's response after 1996 district court order).

ARGUMENT

I. BECAUSE THE GOVERNMENT ISSUED AND RE-ISSUED IDENTICAL LAKESHORE CLOSURES, BASED ON THE SAME ADMINISTRATIVE RECORD, AND THE DISTRICT COURT ENJOINED THE GOVERNMENT FROM ENFORCING THESE LAKESHORE CLOSURES ON THAT RECORD, THE SNOWMOBILERS PRESENT A JUSTICIABLE ISSUE.

The Government responds to the Snowmobilers' argument that the Eighth Circuit improperly decided a non-justiciable issue by claiming that the Snowmobilers' appeal is itself moot and died with the park's 1992 compendium. The Government's argument logically leads this Court to summarily vacate the Eighth Circuit's decision as moot; the

Snowmobilers agree that the decision should be summarily vacated, albeit for different reasons.

But the Snowmobilers disagree with the Government's report of the record. The Government first issued the Lakeshore Closures in 1992 and continued to re-issue them each year thereafter. The Eighth Circuit described the 1992 order as "renewed" in 1993 and 1994. Mausolf v. Babbitt, 85 F.3d 1295, 1298 (8th Cir. 1996). The Government and the Snowmobilers submitted an agreed-upon administrative record to the district court. The Government never supplemented or otherwise modified this record; the Government continued to re-issue the Lakeshore Closures with no new biological opinions, on-site research or other new data. On this record, the district court rejected the Lakeshore Closures, and enjoined the Government from enforcing the Lakeshore Closures. The district court's injunction is not tied to a particular compendium – nor should it be when all the Lakeshore Closures since 1992 were identical, based on the same administrative record. The Eighth Circuit reversed on this same record. Whether the Eighth Circuit improperly reached and decided the merits of the Lakeshore Closures is properly before this Court.

Alternatively, this issue may be characterized as justiciable because it is capable of repetition yet avoiding judicial review. Given the Park's repeated enactment of the Lakeshore Closures, a "reasonable expectation" or "demonstrable probability" exists that this same lakeshore closure controversy would recur against the same complainant, the Snowmobilers. Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per curium).

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE EIGHTH CIRCUIT IGNORED THIS COURT'S DIAMOND v. CHARLES DECISION. EVEN ACCEPTING THE GOVERNMENT'S

LIMITED INTERPRETATION OF DIAMOND, THE LOWER COURTS HAVE INTERPRETED DIAMOND DIFFERENTLY, AND THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE THE SPLIT AMONG COURTS.

The Government's arguments only emphasize that the Snowmobilers' petition merits certiorari review to address the viability and interpretation of Diamond v. Charles, 476 U.S. 54 (1986). In Diamond, this Court rejected an intervenor's attempt to defend state regulations on appeal absent the state. 476 U.S. at 58. The Diamond opinion repeatedly stresses the state's ability to defend its regulations, and the inability of a private party – even as an intervenor – to uphold those regulations on appeal without the state. See, e.g., id. at 56 ("Because a private party whose own conduct is neither implicated nor threatened by a criminal statue has no judicially cognizable interest in the state's defense, we dismiss the appeal for want of jurisdiction."); id. at 64 ("this ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join."). The Snowmobilers contend that the Eighth Circuit effectively ignored this Court's decision in Diamond, presenting a significant issue of the continuing viability of Diamond.

The Government argues that Diamond is limited to intervenors without Article III standing. Such a contention confuses the doctrine of mootness with the doctrine of standing. Mootness is the doctrine of standing set in a time frame; the mootness inquiry is whether the intervenor retains its standing after a particular event. See Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1069 n.22 (1997). To say, then, that a litigant once had standing does not answer the mootness inquiry. The question here is

whether the litigant retained this standing after the Government abandoned the regulations at issue. The Government never answers this question,

Even assuming the Government's interpretation is correct, it presents an important intercircuit conflict for this Court to resolve. The D.C. and Ninth Circuits, in addition to the Eighth Circuit decision below, limit the Diamond decision to its facts. National Wildlife Fed'n v. Lujan, 928 F.2d 453 (D.C. Cir. 1992); Yniguez v. State of Arizona, 939 F.2d 813 (9th Cir. 1991). By contrast, the First and Sixth Circuits recognize the broad Diamond holding. United States v. AVX Corp., 962 F.2d 108 (1st Cir. 1992); Associated Builders & Contractors v. Perry, 16 F.3d 688 (6th Cir. 1994). In short, both the Snowmobilers' and the Government's interpretation of Diamond support certiorari review.

CONCLUSION

This Court should therefore grant the Snowmobilers a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

Corey J. Ayling
Counsel of Record
Kathleen M. Brennan
McGrann Shea Franzen Carnival
Straughn & Lamb, Chartered
2200 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Telephone: (612) 338-2525

Attorneys for Petitioners

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